253 N.C. App.—No. 3 Pages 410-658

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 24, 2019

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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MARK DAVIS[13]

[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016.
[9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016.
[11]Retired 31 December 2018. [12]Retired 31 December 2018. [13]Resigned 24 March 2019.

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COURT OF APPEALS

CASES REPORTED

FILED 16 MAY 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appeal and Error—appealability—criminal contempt—appeal from district court to superior court—Defendant father's appeal of the portion of an order finding him in criminal contempt for failure to communicate with plaintiff mother regarding the whereabouts of the parties' minor son was not properly before the Court of Appeals. Criminal contempt orders are properly appealed from district court to the superior court. **McKinney v. McKinney, 473.**

Appeal and Error—appealability—pretrial orders multiple liability insurers—asbestos and benzene—no certification—petition for certiorari denied—In a

case involving the manufacturer of products containing benzene and asbestos and multiple liability insurance companies, it was noted that neither plaintiff-Radiator Safety Company (RSC) nor Fireman's Fund Insurance Company had attempted to obtain N.C.G.S. § 1A-1, Rule 54(b) certification of interlocutory orders, and those orders thus remained subject to change until entry of a final judgment. Moreover, petitions for certiorari by RSC and Fireman's Fund were denied. Significant non-collateral issues such as damages remained disputed and it was unclear whether other claims had been resolved. **Radiator Specialty Co. v. Arrowood Indem. Co., 508.**

Appeal and Error—appellate rules violation—Rule 28(b)(6)—no sanctions— The Court of Appeals elected not to impose any sanctions for plaintiff's failure to follow N.C. R. App. 28(b)(6), requiring a brief to contain a concise statement of the applicable standard of review. **Wilson v. Pershing, LLC, 643.**

Appeal and Error—interlocutory order—multiple insurance companies—trigger order for coverage—substantial right not affected—In a case involving a manufacturer of products containing benzene and asbestos and multiple liability insurance companies, one of the insurance companies (Fireman's Fund) could not establish appellate jurisdiction over an interlocutory appeal based on the contention that a Trigger Order for liability coverage affected a substantial right. The Trigger Order had no practical effect on Fireman's Fund's substantial rights because the trial court entered an order that Fireman's Fund owed no duty to plaintiff absent its consent. Additionally, Fireman's Fund did not show how application of the trigger order would impact any particular claim. **Radiator Specialty Co. v. Arrowood Indem. Co., 508.**

Appeal and Error—interlocutory orders—partial summary judgment—non-collateral issues remaining—not a final judgment—In a complex liability insurance case involving a company that manufactured products containing benzene and asbestos, partial summary judgment orders were interlocutory even though defendant-Fireman's Fund Insurance Company contended that the orders constituted a final judgment for appellate purposes. Certain coverage disputes were resolved, but non-collateral issues remained, including damages and the individual claims of plaintiff against defendant-National Union Fire Insurance Company. **Radiator Specialty Co. v. Arrowood Indem. Co., 508.**

Appeal and Error—interlocutory orders—substantial right exception—duty to defend—unidentified pending claims—appeal dismissed—The Court of Appeals dismissed the appeals of the manufacturer of products containing benzene and asbestos (Radiator Specialty Company (RSC)) in a case that involved multiple liability insurance companies. While RSC contended that partial summary judgment and other orders affected its substantial right to duty-to-defend coverage, the duty-to-defend substantial right exception has never been applied to orders that resolve ancillary coverage disputes with respect to numerous unidentified claims. RSC made a bare citation to *Cinoman v. Univ. of N. Carolina*, 234 N.C. App. 481 (2014), without application or analysis and did not establish that *Cinoman* controlled here. Furthermore, RSC never explained the practical impact that applying any of these orders (including allocation and trigger orders for determining coverage and costs) would have on its right to insurance defense in any allegedly pending claim. **Radiator Specialty Co. v. Arrowood Indem. Co., 508.**

Appeal and Error—interlocutory orders and appeals—contempt order—substantial right—The owners of a closely held business's appeal from a contempt

and not medical malpractice. Plaintiff was not required to comply with Rule 9(j). Further, the Court of Appeals did not improperly supplement plaintiff's complaint by addressing Rule 9(j) certification since it was necessary to determine whether the trial court erred in dismissing plaintiff's complaint under Rule 9(j). **Locklear v. Cummings, 457.**

MOTOR VEHICLES

Motor Vehicles—impaired driving—operating a motor vehicle—on a street, highway, or public vehicular area—sufficiency of the evidence—In an impaired driving prosecution arising from an encounter with an officer in a hotel parking lot, there was sufficient evidence for the jury to decide whether defendant had been driving the vehicle and whether he had driven it on a public highway, street, or public vehicular area. The officer had been called to the hotel because of robberies in the area, the engine of the vehicle was not running when the officer approached it, the vehicle was not in a parking space, defendant was sitting in the driver's seat, and defendant admitted that he had been driving the vehicle and described the route he had taken to the hotel in detail. **State v. Burris, 525.**

Motor Vehicles—impaired driving—warrantless—exigent circumstances— There were exigent circumstances supporting a warrantless blood draw in an impaired driving prosecution where the trial court found that the officer had a reasonable belief that a delay would result in the dissipation of the alcohol in defendant's blood. The reading on the portable roadside breath test was .10; the officer believed that the reading was close to .08 after defendant was taken to the police department, refused the breathalyzer test, and made a telephone call; and the officer, who was the only officer at the scene, believed that it would have taken another hour and a half for another officer to arrive and to obtain a warrant. **State v. Burris, 525.**

PROCESS AND SERVICE

Process and Service—improper service—private process service—no evidence sheriff unable to fulfill duties—The trial court did not err by dismissing plaintiff patient's negligence claims against defendant hospital under N.C.G.S. § 1A-1, Rule 12(b)(5) based on improper service. Plaintiff used a private process service and there was no evidence that the sheriff was unable to fulfill the duties of a process server as required by statute. **Locklear v. Cummings, 457.**

SEARCH AND SEIZURE

Search and Seizure—denial of motion to suppress—plain error—Where the trial court erroneously denied defendant's motion to suppress firearms seized in a search of his house, the error had a probable effect on the jury's decision to convict defendant of possession of a firearm by a felon and amounted to plain error. Without this evidence, there would have been no evidence of criminal conduct. **State v. Powell, 590.**

Search and Seizure—search of parolee's home—parole officer present—not for purposes of parole—On the specific facts of this case, there was plain error where the trial court denied a parolee's motion to suppress firearms seized from his house by a violent crime task force of U.S. Marshals accompanied by two parole officers (but not defendant's parole officer). N.C.G.S. § 15A-1343(b)(13) has been amended to require that warrantless searches by a probation officer be for purposes

SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

Opinions will be filed on the first and third Tuesdays of each month.

EDWARDS v. FOLEY

[253 N.C. App. 410 (2017)]

BARRY D. EDWARDS, XMC FILMS, INCORPORATED, AEGIS FILMS, INC., AND DAVID E. ANTHONY, PLAINTIFFS

v.

CLYDE M. FOLEY, RONALD M. FOLEY, LAVONDA S. FOLEY, SAMUEL L. SCOTT, CRS TRADING CO. LLC., BROWN BURTON, RONALD JED MEADOWS, AND AMERICAN SOLAR KONTROL, LLC, DEFENDANTS

No. COA16-1060

Filed 16 May 2017

Appeal and Error—interlocutory orders and appeals—no substantial right alleged—motion to amend brief improper after other party filed brief

Defendants' appeal from an interlocutory order granting plaintiffs' motion for summary judgment in a dispute between minority shareholders was dismissed. Defendants failed to allege a substantial right was affected and were not permitted correct their mistake by moving to amend their principal brief after plaintiffs already filed their brief pointing out the error.

Appeal by Defendants from order entered 28 June 2016 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 4 May 2017.

Ward and Smith, P.A., by Alexander C. Dale, Edward J. Coyne, III, and Knight Johnson, LLC, by Bryan M. Knight, for the Plaintiffs-Appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Kimberly M. Marston and Walter L. Tippett, Jr., for the Defendants-Appellants.

DILLON, Judge.

Defendants appeal from an order granting Plaintiffs' motion for summary judgment. For the following reasons, we dismiss Defendants' appeal as interlocutory.

I. Background

Clyde Foley is a co-founder of XMC Films ("XMC"), a Virginia corporation that produces coated film products. This matter involves a dispute between Mr. Foley and other minority shareholders and XMC and its current management.

Plaintiffs filed numerous claims against Defendants. In response, Defendants filed a motion to dismiss, answer, counterclaims, and a third-party complaint.[1]

Plaintiffs and Defendants filed cross-motions for summary judgment. The trial court granted Plaintiffs' motion for summary judgment on Defendants' counterclaims but *denied* Defendants' motion for summary judgment on Plaintiffs' claims.

Defendants appealed the trial court's order granting Plaintiff's summary judgment motion on Defendants' counterclaims *and* denying Defendants' motion for summary judgment; however, in their appellate brief, Defendants failed to articulate any substantial right affected by the trial court's interlocutory order. After Plaintiffs filed their appellee brief pointing out this deficiency, Defendants requested that this Court allow them to amend their brief. For the reasons below, we denied Defendants' motion to amend their principal brief and hereby dismiss their appeal from the trial court's interlocutory order.

II. Analysis

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). As a general rule, there is no right of appeal from an interlocutory order. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). However, a party is permitted to appeal an interlocutory order if "[1] . . . the trial court certifies in the judgment that there is no just reason to delay the appeal[,]" or if "[2] the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Id.* at 379, 444 S.E.2d at 253 (internal marks and citations omitted). "Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[.]" *Id.*

In the present case, because the trial court declined to certify the matter for immediate appeal, it was Defendants' burden to establish on appeal that the order affected a substantial right.

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1. In their third-party complaint, Defendants asserted claims against Aegis Films, Inc. and David E. Anthony. Aegis Films and Mr. Anthony were subsequently designated as Plaintiffs in the main action in a consent order realigning the parties.

Rule 28(b) of the North Carolina Rules of Appellate Procedure provides, in relevant part:

> An appellant's brief *shall* contain . . . [a] *statement of the grounds for appellate review*. Such statement *shall* include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement *must contain* sufficient facts *and argument to* support appellate review on the ground that the challenged order affects a substantial right.

N.C. R. App. P. 28(b) (emphasis added). While our Supreme Court has held that "noncompliance with 'nonjurisdictional rules' such as Rule 28(b) 'normally should not lead to dismissal of the appeal[,]" *Larsen v. Black Diamond French Truffles, Inc.*, ___ N.C. App. ___, ___, 772 S.E.2d 93, 95 (2015) (quoting *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008)), when an appeal is interlocutory, Rule 28(b)(4) is *not* a "nonjurisdictional" rule. *Larsen*, ___ N.C. App. at ___, 772 S.E.2d at 96. "Rather, the *only way* an appellant may establish appellate jurisdiction in an interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right." *Id.*

Here, Defendants failed to allege in their principal brief any substantial right affected by the trial court's interlocutory order. After Plaintiffs filed their appellee brief identifying Defendants' failure to properly allege grounds for appeal, Defendants moved for leave to amend their principal brief. Based on our holding in *Larsen*, we denied Defendants' motion and hereby dismiss the appeal.

In *Larsen*, the appellants failed to allege a substantial right deprivation in their principal brief. *Id.* at ___, 772 S.E.2d at 95. After appellees pointed out the failure in their appellee brief, appellants filed a reply brief alleging the substantial right deprivation. *Id.* We dismissed the appeal, stating as follows:

> [W]e will not allow [appellants] to correct the deficiencies of their principal brief in their reply brief. Because it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, and [appellants] have not met their burden, [the] appeal must be dismissed."

Id. at ___, 772 S.E.2d at 96 (internal marks and citations omitted).

We see no functional difference between the appellants' attempt in *Larsen* to correct their mistake in a reply brief and Defendants' attempt in the present case to correct their mistake by moving to amend their principal brief *after* Plaintiffs have already filed their brief. Accordingly, based on the reasoning in *Larsen*, we are compelled to dismiss the appeal.

DISMISSED.

Judges DIETZ and TYSON concur.

STEPHEN HANNA, PLAINTIFF
v.
STEPHEN SIDNEY WRIGHT, DEFENDANT

No. COA16-1134

Filed 16 May 2017

Appeal and Error—interlocutory orders and appeals—undetermined money judgment—substantial right—failure to show business kept from operating as a whole

Defendant's appeal from an interlocutory order regarding the undetermined amount of a money judgment in a breach of contract case arising from the sale of a track loader was dismissed. Although the inability to practice one's livelihood and the deprivation of a significant property interest affect substantial rights, an order that does not prevent the business as a whole from operating does not affect a substantial right.

Appeal by defendant from order of default judgment and preliminary injunction, and an order setting the cash bond to stay execution of the judgment and preliminary injunction, entered 14 June 2016 by Judge Amber Davis in Currituck County District Court. Heard in the Court of Appeals 19 April 2017.

Brett Alan Lewis, for plaintiff-appellee.

Phillip H. Hayes, for defendant-appellant.

MURPHY, Judge.

Stephen Sidney Wright ("Defendant") appeals from the trial court's order of default judgment and preliminary injunction, and order setting the cash bond to stay execution of the judgment and preliminary injunction. After careful review, we dismiss Defendant's appeal as interlocutory.

Background

In March 2013, Plaintiff contracted to provide Defendant a 2006 MTL20 Track Loader ("Track Loader"). After the contract was formed, Defendant took possession of the Track Loader in March 2013. On 16 February 2016, Plaintiff filed a civil summons and complaint in Currituck County District Court against Defendant alleging breach of this contract, including a request for injunctive relief. Defendant was served with the civil summons and complaint on 22 February 2016. On 30 March 2016, Plaintiff moved for entry of default, which was granted by the Currituck County Clerk of Superior Court. On 25 April 2016, Plaintiff filed a motion for default judgment. On 9 June 2016, Defendant through counsel filed a motion to set aside entry of default and default judgment, and a proposed answer. That same day, the trial court granted the default judgment and preliminary injunction. The trial court decreed that Plaintiff was entitled to take possession of the Track Loader. The trial court further ordered that Plaintiff was "entitled to a money judgment for rent-money owed upon future motion in the cause for damages[.]" The trial court entered the order on 14 June 2016. Defendant appealed from this order on 14 July 2016. The amount of the money judgment to be entered against Defendant has not yet been determined.

Analysis

At the outset, we note that the present appeal is interlocutory because the amount of the money judgement to be entered has not yet been determined. *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985) (explaining that an appeal is interlocutory if it "directs some further proceeding preliminary to the final decree"). Therefore, we must review whether we have jurisdiction over this appeal because "whether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation, internal quotation marks, and brackets omitted).

"Generally, there is no right of immediate appeal from an interlocutory order." *Feltman v. City of Wilson*, 238 N.C. App. 246, 250, 767 S.E.2d 615, 618 (2014) (citation omitted). For an interlocutory appeal to be heard, the appellant must establish (1) that the trial court's order certified the case for appeal pursuant to N.C. R. Civ. P. 54(b); or (2) the order deprived the appellant of "a substantial right that will be lost absent review before final disposition of the case." *Bessemer City Express, Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 639, 573 S.E.2d 712, 714 (2002) (citing N.C.G.S. §§ 1-277(a) and 7A-27(d)(1) (2001)). Here, Defendant admits his appeal is interlocutory, but argues that we may hear this interlocutory appeal because the order affects a substantial right.[1] Specifically, he argues that the right of possession of the Track Loader, for which he claims to have made partial payment, as a means of earning a living "will be irreparably prejudiced if not reviewed before entry of the final money judgment." We disagree.

"Although our courts have recognized the inability to practice one's livelihood and the deprivation of a significant property interest to be substantial rights," we have not recognized that an order that does not prevent the business *as a whole* from operating affects a substantial right. *Bessemer City Express, Inc.*, 155 N.C. App at 640, 573 S.E.2d at 714. Here, Defendant did not show how his business would be kept from operating as a whole as a result of the appealed order. Although he alleges that the loss of the Track Loader would irreparably prejudice him, he does not allege, nor does the record show, how the mere loss of the possession of the Track Loader would cause such prejudice. Nor does he argue that losing possession of the Track Loader would prevent Defendant from practicing his livelihood *as a whole*. As it was Defendant's burden to establish that a substantial right would be lost absent review before final disposition of the case, we cannot simply read the extent to which his business will be affected into the record. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) ("[I]t is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[.]")

The amount of the money judgment to be entered against Defendant remains outstanding. Defendant's argument on appeal does not evince sufficient grounds for an interlocutory appeal. Thus, we have no jurisdiction to hear this matter at this time.

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1. The trial court did not certify its order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Conclusion

For the reasons stated above, Defendant's interlocutory appeal is dismissed.

DISMISSED.

Judges CALABRIA and DIETZ concur.

GEORGE HENDERSON, PLAINTIFF
v.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, VINCENT JACOBS (CAROLINA BASKETBALL CLUB-CBC (INDIVIDUALLY); DENNIS COVINGTON CAROLINA BASKETBALL CLUB-CBS (INDIVIDUALLY); AND CAROLINA BASKETBALL CLUB, LLC., DEFENDANTS

No. COA16-977

Filed 16 May 2017

1. Appeal and Error—interlocutory orders and appeals—Rule of Appellate Procedure 2—writ of certiorari—dismissal of one but not all defendants

The Court of Appeals exercised its authority under Rule of Appellate Procedure 2 to consider plaintiff's appeal in a personal injury case as a petition for writ of certiorari in order to review the trial court's interlocutory order dismissing one but not all defendants.

2. Immunity—statutory immunity—personal injury claims—lease of school gymnasium to non-school group

The trial court did not err by granting defendant Board of Education's motion to dismiss personal injury claims based on the doctrine of statutory immunity. The Board properly followed its own rules and regulations when it leased the school gymnasium to defendant Carolina Basketball Club on the date plaintiff referee was injured.

3. Immunity—statutory immunity—governmental immunity—contract to lease school gymnasium to non-school group—third-party beneficiary

Although plaintiff contended defendant Board of Education waived governmental immunity by entering into a contract with defendant Carolina Basketball Club, the Board was required to do

so under the mandate of N.C.G.S. § 115C-524(c). Although plaintiff claimed he was a third-party beneficiary of the contract, plaintiff's argument was premised upon common law immunity instead of statutory immunity.

Appeal by plaintiff from order entered 24 March 2016 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 February 2017.

The Law Office of Java O. Warren, by Java O. Warren, for plaintiff-appellant.

Campbell Shatley, PLLC, by Christopher Z. Campbell and Chad Ray Donnahoo, for defendant-appellees.

BRYANT, Judge.

Where defendant Board complied with its own rules and regulations when it entered into a valid contract permitting a basketball club to use a school's gymnasium for its basketball tournament, defendant Board is entitled to statutory immunity pursuant to N.C. Gen. Stat. § 115C-524(c), and the trial court did not err in dismissing plaintiff's claims pursuant to Rules 12(b)(1), (2), and (6). We affirm.

On 22 September 2012, plaintiff George Henderson was employed to referee a basketball tournament at Hawthorne High School in Mecklenburg County from 9:00 a.m. to 7:00 p.m. TSO, a third-party referee company, contracted with plaintiff to referee the game. The tournament was sponsored, organized, and conducted by Carolina Basketball Club ("defendant CBC"). Defendants Vince Jacobs and Dennis Covington are the owners and/or agents of defendant CBC. The Charlotte-Mecklenburg Board of Education ("defendant Board"), owns, leases, and/or manages Hawthorne High School, including the gymnasium basketball court. Defendant CBC paid to defendant Board the required facilities fee for use of the basketball court for the tournament.

Prior to 22 September 2012, plaintiff had never refereed at the Hawthorne High School gymnasium. His referee duties included running up and down the sides of the gymnasium basketball court during the game while monitoring the play of the participants. Plaintiff alleges that while running up and down the sides of the court as he officiated, he stepped onto a warped and uneven area of the court immediately adjacent to the playing area. Plaintiff immediately fell to the floor, at

which point he felt severe pain in his left knee. Plaintiff also alleges that after his fall, other officials informed him that they run around this warped area of the basketball court to avoid tripping over it. Plaintiff alleges that, *inter alia*, his injuries include "anterior cruciate and lateral collateral ligament tear of the left knee and avulsion fracture of proximal lateral fibula," as a result of which he has undergone several surgeries and incurred medical expenses in excess of $300,000.00.

On 12 March 2015, plaintiff George Henderson commenced this action by filing a complaint against defendant CBC, and the filing of an amended complaint on 22 September 2015, which added defendants Jacobs and Covington, and defendant Board. On 7 December 2016, defendants Jacobs and CBC filed their answer to plaintiff's amended complaint. On 14 December 2016, defendant Board timely filed its answer denying plaintiff's allegations, asserting a defense for failure to state a claim, and asserting cross-claims against the remaining defendants. Defendant Covington never answered plaintiff's amended complaint. On 3 February 2016, defendant Board filed a motion to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1), (2), and (6).

On 15 March 2016, a hearing was held on defendant Board's motion in Mecklenburg County Superior Court, the Honorable Robert C. Ervin, Judge presiding. By order filed 24 March 2016, Judge Ervin granted defendant Board's motion to dismiss plaintiff's claims against defendant Board with prejudice.

Almost two months later, on 11 May 2016, plaintiff and defendants Jacobs and CBC filed a joint motion for entry of judgment to revise the 24 March 2016 order *nunc pro tunc*, pursuant to Rules 54(b), 60(b)(2), and 60(b)(6) of the North Carolina Rules of Civil Procedure, to certify the matter for immediate appeal.[1] The next day, on 12 May 2016, plaintiff filed notice of appeal from the 24 March 2016 order.

[1] As an initial matter, we note that plaintiff appeals from an order dismissing one but not all of the parties to the action. The order from which plaintiff appeals dismissed plaintiff's claims with prejudice only as to defendant Board. However, in defendant Board's brief to this Court, it acknowledges that "[s]ubsequent to the filing of this appeal, [p]laintiff dismissed all remaining [d]efendants." Yet the record contains no evidence of the voluntary dismissal(s) with prejudice as to the remaining defendants—Vincent Jacobs, Dennis Covington, and Carolina

1. There is no indication in the record that a ruling was obtained on this motion.

Basketball Club, LLC—nor has plaintiff filed a supplement to the record on appeal. Accordingly, plaintiff's appeal "appears to be interlocutory." *See Reeger Builders, Inc. v. J.C. Demo Ins. Grp., Inc.*, No. COA13-622, 2014 WL 859327, at *2 (N.C. Ct. App. Mar. 4, 2014) (unpublished) (citing *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)).

However, because "[w]e believe that dismissing this appeal as interlocutory would likely waste judicial resources[,]" *Legacy Vulcan Corp. v. Garren*, 222 N.C. App. 445, 447, 731 S.E.2d 223, 225 (2012) (citing *Brown v. City of Winston-Salem*, 171 N.C. App. 266, 269, 614 S.E.2d 599, 601 (2005)), we "consider plaintiff's brief as a petition for writ of certiorari." *Reeger Builders*, 2014 WL 859327, at *2 (citing N.C. R. App. P. 21 (2013)) (considering the plaintiffs' brief as a petition for writ of certiorari as the plaintiffs' appeal was interlocutory where the trial court dismissed one but not all of the parties to the action and the plaintiffs stated in brief that they had settled with the remaining defendants, but no evidence in the record showed that plaintiffs entered a voluntary dismissal with prejudice as to the remaining defendants). "We exercise our authority under Rule 2 to consider [p]laintiff's appeal as a petition for writ of *certiorari*, and we grant *certiorari* to review the trial court's interlocutory order." *Legacy Vulcan Corp.*, 222 N.C. App. at 447, 731 S.E.2d at 225 (citation omitted); *see also id.* (quoting N.C. R. App. P. 21(a)(1) (2011)) ("The writ of certiorari may be issued in appropriate circumstances . . . when no right of appeal from an interlocutory order exists[.]").

On appeal, plaintiff contends the trial court erred in granting defendant's motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) (I) under the doctrine of statutory immunity; (II) under the doctrine of governmental immunity; and (III) as to intended third-party beneficiaries.

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

I. Statutory Immunity

[2] Plaintiff first argues the trial court erred in granting defendant Board's motion to dismiss for failure to state a claim for which relief could be granted pursuant to the doctrine of statutory immunity. Specifically, plaintiff contends that defendant Board cannot establish that it complied with its own rules and regulations when it entered into the agreement with defendant CBC permitting defendant CBC to use the gymnasium for its basketball tournament. Plaintiff contends that defendant Board failed to require that defendant CBC have liability insurance, per its rules and regulations. We disagree.

"A county or city board of education is a governmental agency, and therefore is not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority." *Seipp v. Wake Cnty. Bd. of Educ.*, 132 N.C. App. 119–20, 121, 510 S.E.2d 193, 194 (1999) (quoting *Beatty v. Charlotte-Mecklenburg Bd. of Educ.*, 99 N.C. App. 753, 755, 394 S.E.2d 242, 244 (1990)). North Carolina General Statutes section 115C-524(c) provides boards of education with specific statutory immunity from any liability for personal injuries suffered by an individual participating in non-school related events and activities on school grounds:

> Notwithstanding the provisions of G.S. 115C-263 and 115C-264, local boards of education may adopt rules and regulations under which they may enter into agreements permitting non-school groups to use school real and personal property, except for school buses, for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. *No liability shall attach to any board of education or to any individual board member for personal injury suffered by reason of the use of such school property pursuant to such agreements.*

N.C. Gen. Stat. § 115C-524(c) (2015) (emphasis added).

In *Seipp*, the PTA sponsored a haunted house at an elementary school in Wake County. 132 N.C. App. at 120, 510 S.E.2d at 193–94. In order to hold the event at the school, the PTA was required to comply with the Wake County Board of Education's ("the Board") rules regarding facility use by (1) submitting a signed and completed facility use application; (2) attaching a processing fee; (3) showing proof of liability insurance; and (4) executing a hold harmless agreement. *Id.* at 121–22, 510 S.E.2d at 195. Because the PTA did not submit an application pursuant to the Board's

rules, this Court held that the use of the school for the haunted house event—where the plaintiff in *Seipp* was injured—was not used pursuant to an agreement made within the meaning of N.C.G.S. § 115C-524(b).[2] *Id.* at 122, 510 S.E.2d at 195. In other words, because the agreement with the PTA was not entered into pursuant to the Board's own rules, the Board was not entitled to the immunity granted under section 115C-524(b). *Id.* at 121–22, 510 S.E.2d at 195. *But see Royal v. Pate*, No. COA06-571, 2007 WL 1246432, at *3 (N.C. Ct. App. May 1, 2007) (unpublished) (distinguishing *Seipp* and holding that because an agreement between a school board and a recreation commission for use of the school board's softball batting cage was consistent with the board's rules and regulations, the school board and board member were protected by statutory immunity pursuant to N.C.G.S. § 115C-524(b) (2005)).

In the instant case, defendant Board entered into a validly executed agreement with defendant CBC on 21 September 2012, and defendant CBC paid defendant Board $170.00—the required facilities fee—for the use of the gymnasium basketball court. Further, plaintiff makes no allegation that defendant CBC was using the facility for a non-permitted use. Defendant CBC also agreed to indemnify and hold harmless defendant Board against claims associated with defendant CBC's use of the facility. Indeed, there is nothing to support plaintiff's claim that defendant Board "did not procure insurance for the event" and plaintiff does not allege that defendant Board failed to comply with the agreement requiring defendant CBC to procure insurance.

Thus, where plaintiff's own complaint makes clear that defendant Board followed its own rules and regulations when it leased the gymnasium to defendant CBC on the date plaintiff was injured therein, defendant Board is entitled to statutory immunity pursuant to N.C.G.S. § 115C-524(c). Accordingly, the trial court did not err in dismissing plaintiff's claim pursuant to Rules 12(b)(1), (2), and (6) based on statutory immunity, and plaintiff's argument is overruled.

II. Governmental Immunity

[3] "A county or city board of education is a governmental agency and its employees are not ordinarily liable in a tort or negligence action

2. On 11 June 2015, the North Carolina legislature enacted Senate Bill No. 315, which split section 115-524(b) into two subsections—(b) and (c)—and added a fourth, subsection (d). N.C. Sess. Laws 2015-64, § 1, eff. June 11, 2015. *Seipp* predates the 2015 amendment, but as the substance of the law did not materially change after the legislature split section (b) of N.C.G.S. § 115-524 into two subsections, *Seipp* remains instructive. *See* 132 N.C. App. at 121, 510 S.E.2d at 194 (citing to N.C.G.S. § 115C-524(b) (1997)).

unless the board has waived its sovereign immunity." *Herring v. Liner*, 163 N.C. App. 534, 537, 594 S.E.2d 117, 119 (2004) (citing *Ripellino v. N.C. Sch. Bds. Ass'n*, 158 N.C. App. 423, 427, 581 S.E.2d 88, 91–92 (2003)). In the instant case, plaintiff did not allege in his amended complaint that defendant Board waived its governmental immunity. Instead, plaintiff contends defendant Board waived governmental immunity by entering into a contract with defendant CBC. *See Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976) ("[W]henever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract."). For the reasons that follow, *see infra* Section III, this argument is without merit.

III. Intended Third-Party Beneficiaries

Plaintiff lastly claims that he is a third-party beneficiary of the contract between defendant CBC and defendant Board and, therefore, he can recover for his personal injury and related damages through the theory of contract. We disagree.

"North Carolina recognizes the right of a third-party beneficiary . . . to sue for breach of a contract executed for his benefit." *Town of Belhaven, NC v. Pantego Creek, LLC*, ___ N.C. App. ___, ___, 793 S.E.2d 711, 719 (2016) (alteration in original) (quoting *Babb v. Bynum & Murphrey, PLLC*, 182 N.C. App. 750, 753, 643 S.E.2d 55, 57 (2007). However, plaintiff's argument is premised upon notions of common law immunity and not the statutory immunity at issue in this case.

This case involves the application of N.C.G.S. § 115C-524(c), which provides that "[n]o liability shall attach to any board of education . . . for personal injury suffered by reason of the use of such school property pursuant to such agreements." *Id.* § 115C-524(c) (emphasis added). Thus, in those situations covered by N.C.G.S. § 115C-524(c) (i.e., when a school permits a non-school group to use school property), school boards are *required* to enter into "agreements" with those non-school groups and are not liable for damages related to any "personal injury" which might occur as a result of those agreements. *See id.* In other words, in order for a school board to be entitled to the statutory immunity granted by section 115C-524(c), a school board *must* enter into a contract. It is therefore contradictory for plaintiff to argue that defendant Board has somehow waived immunity by complying with the mandate of the statute which, absent that compliance, will not grant that immunity; the existence of a contract cannot be both a requirement for and an exception to the application of statutory immunity. Plaintiff's

argument is overruled, and the trial court's order dismissing plaintiffs' claims as to defendant Board is

AFFIRMED.

Judges INMAN and ZACHARY concur.

IN THE MATTER OF K.B.

No. COA16-970

Filed 16 May 2017

1. Child Abuse, Dependency, and Neglect—dependency—petition failed to allege—sufficiency of allegations

The trial court did not err by adjudicating a minor child as a dependent juvenile. Although the Department of Social Services did not check the box alleging dependency on the petition form, the allegations attached to the petition were sufficient to put respondent mother on notice that dependency would be at issue.

2. Child Abuse, Dependency, and Neglect—child abuse—sufficiency of findings—physical injury by other than accidental means

The trial court did not err by adjudicating a minor child as an abused juvenile. The trial court's findings supported the conclusions that respondent parents created a substantial risk of physical injury to the minor child by other than accidental means, and that respondents inflicted or allowed to be inflicted on the minor child serious physical injury by other than accidental means.

3. Child Abuse, Dependency, and Neglect—child neglect—failure to provide proper supervision—failure to keep medications current

The trial court did not err by adjudicating a minor child as a neglected juvenile. The findings showed that respondent mother failed to provide proper supervision for the minor child including that she was unable to provide appropriate discipline or nurturing to deal with the child's emotional and behavioral issues. Further, respondent did not follow instructions to take the minor child to a psychiatrist, and she let the child's prescription lapse for two weeks for a medication that could not just be stopped without causing side effects.

IN RE K.B.

[253 N.C. App. 423 (2017)]

Appeal by respondent-mother from orders entered 25 May 2016 by Judge William A. Marsh, III, in Durham County District Court. Heard in the Court of Appeals 17 April 2017.

Senior Assistant County Attorney Cathy L. Moore for petitioner-appellee Durham County Department of Social Services.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for Guardian ad Litem.

Rebekah W. Davis for respondent-appellant mother.

ELMORE, Judge.

Respondent-mother appeals from the trial court's orders adjudicating her son, K.B. (Kirk)[1], an abused, neglected, and dependent juvenile. For the following reasons, we affirm.

I. Background

Respondent-mother and respondent-father adopted Kirk when he was five years old. When Kirk was two years old, he tested positive for cocaine and was removed from his biological mother's home. Kirk was placed in a foster home where he resided for three years. His biological mother relinquished her parental rights and his biological father's parental rights were terminated by the court. Although Kirk's foster mother wished to adopt him, his foster father did not. Kirk was quickly placed for adoption with respondents in July 2011 and the adoption was finalized in December 2011.

Shortly after adopting Kirk, respondent-mother became pregnant with twins, a boy and a girl. Kirk began to act out and exhibit behavioral issues. Respondent-mother attributed Kirk's change in behavior to his past experience of being displaced by a new baby boy in his foster home.

From 21 February 2012 to 9 November 2015, the Durham County Department of Social Services (DSS) received fifteen Child Protective Services (CPS) reports regarding Kirk. DSS substantiated three reports filed 7 May 2012, 11 September 2013, and 26 September 2013 for neglect due to improper discipline. Respondent-mother admitted to hitting Kirk with a ruler in 2012, and Kirk was found to have thirty to fifty belt marks on his buttocks, right thigh, and hip in September 2013. Respondent-father

1. A pseudonym is used to protect the juvenile's identity and for ease of reading.

admitted that he and respondent-mother spanked Kirk as a form of discipline. After the September 2013 reports, DSS began in-home services with the family. They completed the services and the case was closed in July 2014.

Because respondents continued to have issues with Kirk's behavior, he was placed in a kinship placement from 26 September to 7 October 2013, a therapeutic foster home from 23 October 2013 to 31 March 2014, and the Wright School from 2 February to 10 September 2015.

After Kirk returned home from the Wright School, DSS received a CPS report on 9 November 2015 alleging that Kirk had " 'black and bruising' around the left eye, . . . bruising around the lips, scratches on the bridge of the nose, and below the lips, [Kirk's] right pointer finger [was] swollen from the knuckle to the tip and the side of the fingers on the right hand [were] punctured." The report also alleged that respondents did not seek a psychiatrist for Kirk as recommended upon his release from the Wright School and allowed Kirk's prescription for Prozac to lapse from 30 October to 10 November 2015, at a minimum.

DSS filed a petition on 13 November 2015 alleging that Kirk was an abused juvenile in that respondents "inflicted or allowed to be inflicted on the juvenile a serious physical injury by other than accidental means." Specifically, the petition alleged that on or about 8 November 2015, Kirk "sustained a black eye, and broken right index finger. The injuries are unexplained. Neither parent or grandmother could provide an explanation for the injuries. After a visit to his psychiatrist, it was stated that his injuries are not self-inflicted." DSS also alleged that Kirk was a neglected juvenile in that he "does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker." Specifically, the petition alleged that on or about 9 November 2015, respondent-father and the grandmother "were home at the time [Kirk] sustained the injuries but neither could provide an explanation as to what happened to the child." As a result, DSS was granted nonsecure custody of Kirk.

The trial court held an adjudication hearing on 13 to 14 April 2016, and on 9 to 10 May 2016. Dr. Beth Herold was accepted as an expert in the field of child physical abuse, child neglect, and child maltreatment. Dr. Herold treated Kirk in November 2015 after receiving a referral from DSS. When she saw Kirk, he "had a broken finger," "bruises on his face, he had a busted lip, and he had an injury to his chest, some sort of a contusion. He had a purple and yellow bruise and some linear marks through it." Kirk offered multiple explanations for his injuries, claiming

"that he got hit with a rake, that he was wrestling with his father, that he was doing cartwheels, that he dropped a weight on his finger, and that he did it himself." Dr. Herold testified that Kirk's injuries were not consistent with his explanations or with typical self-injury behavior. She opined that it was "highly probable" Kirk was physically abused.

The DSS social worker, Pamela Stanton, testified that at the time of the CPS report respondent-mother told her that Kirk had been off Prozac for at least a week and that "she was sure that some of his behaviors that he was experiencing or displaying in school [were] due to that." Stanton also testified that Kirk gave multiple histories for his injuries, including that he had punched himself in the face, but none explained the severity of injuries he sustained. She testified further that DSS did not receive any reports regarding injuries to Kirk while he was in his other placements outside respondents' home, and that there were instances where mental health treatment was recommended for Kirk but never accessed by respondents. Finally, Stanton testified that respondent-mother previously requested Kirk be removed from her home in 2012 and April 2014, when she told DSS: "I need someone to come get this boy, because if I lay my hands on him, it won't be good."

Respondent-mother testified that she only asked Kirk to be removed from her home when it became "a safety concern," and that she had not spanked Kirk since 2013. She claimed that she was not home when Kirk sustained the injuries in November 2015 and did not know how Kirk was injured: "I was at work during the time that he allegedly snuck out of the home. By the time I got home, he visually had marks on him."

After the hearing, the trial court entered an order on 25 May 2016 adjudicating Kirk an abused, neglected, and dependent juvenile. Respondent-mother entered written notice of appeal.[2]

II. Discussion

A. Adjudication of Dependency

[1] Respondent-mother first argues the trial court erred in adjudicating Kirk a dependent juvenile because the petition only alleged that Kirk was abused and neglected. We disagree.

"The pleading in an abuse, neglect, or dependency action is the petition." N.C. Gen. Stat. § 7B-401 (2015). In an adjudicatory hearing on a juvenile abuse, neglect, or dependency petition, a trial court is required

2. Respondent-father did not appeal and is not a party to this appeal.

to "adjudicate the existence or nonexistence of any of the *conditions alleged in a petition*." N.C. Gen. Stat. § 7B-802 (2015) (emphasis added). "If the court finds . . . that *the allegations in the petition* have been proven by clear and convincing evidence, the court shall so state" in a written order. N.C. Gen. Stat. § 7B-807(a) (2015) (emphasis added).

"[A]llegations in a petition may include specific factual allegations attached to a form petition for support." *In re D.C.*, 183 N.C. App. 344, 349, 644 S.E.2d 640, 643 (2007) (citation omitted) (internal quotation marks omitted). Moreover, "[w]hile it is certainly the better practice for the petitioner to 'check' the appropriate box on the petition for each ground for adjudication, if the specific factual allegations of the petition are sufficient to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate." *Id.* at 350, 644 S.E.2d at 643.

A "dependent juvenile" is defined as

> [a] juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (2015).

Here, DSS did not "check the box" alleging dependency on the form petition filed on 13 November 2015. The allegations attached to the petition, however, were sufficient to put respondent-mother on notice that dependency would be at issue during the adjudication hearing. The attached specific statement of facts alleged:

> The child [Kirk] (9 years old) has "black and bruising" around the left eye, bruising around the lips, scratches on the bridge of the nose, and below the lips, the child's right pointer finger is swollen from the knuckle to the tip and the side of the fingers on the right hand are punctured all [sic] the injuries listed above were unexplained by the legal custodians.
>
> *The legal custodian was unable to provide an alternative placement resource for the child*. The child is diagnosed with ODD, PTSD, Adjustment DX, reactive attachment DX and suicidal thoughts. The child was prescribed the

> following medications Prozac 10mg and adderal [sic] 40 mg.
>
> The legal custodian reported the child left the home several times over the weekend and the injuries were sustained. *The legal custodian failed to provide proper supervision.*

(Emphasis added.) These allegations encompass the language reflected in the statutory definition of dependency—specifically, that respondent-mother failed "to provide for [Kirk's] care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9). Moreover, the first sentence of the trial court's order entering stipulations for adjudication provides: "This matter coming on to be heard before the undersigned judge [ ], on the Durham County Department of Social Services (DSS) *petition alleging abuse, neglect and dependency*." (Emphasis added.) The record shows that respondent-mother had adequate notice that dependency would be at issue during the adjudication phase of the proceedings.

B. Adjudication of Abuse

[2] Respondent-mother next argues the trial court erred in adjudicating Kirk an abused juvenile because the court's findings of fact do not support its conclusions that Kirk was abused.

We review a trial court's adjudication order "to determine '(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact.' " *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* (citation omitted). Unchallenged findings of fact are deemed supported by sufficient evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). "The trial court's 'conclusions of law are reviewable *de novo* on appeal.' " *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (quoting *Starco, Inc. v. AMG Bonding & Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996)).

Respondent-mother contends that the evidence of abuse did not meet the clear and convincing standard. She argues that the trial court's findings of fact and conclusion of law stating that respondents' failure to properly supervise Kirk and maintain his medication led to a risk of injury would support neglect, not abuse.

An "abused juvenile" is defined in relevant part as

> [a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
>
> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
>
> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means . . . .

N.C. Gen. Stat. § 7B-101(1) (2015).

The trial court concluded that Kirk was abused in that respondents "create[d] or allow[ed] to be created a substantial risk of serious physical injury to the juvenile by other than accidental means," and that respondents "inflict[ed] or allow[ed] to be inflicted on the juvenile serious physical injury by other than accidental means." In support of its conclusions, the trial court made the following findings of fact relevant to abuse:

> 14. From February 21, 2012 to November 9, 2015, Durham DSS received a total of fifteen (15) reports of abuse or neglect regarding the child . . . .
>
> . . . .
>
> 13. [sic] Since being placed in [respondent-mother's] home, [Kirk] has been placed in a kinship placement from September 26, 2013 to October 7, 2013; a therapeutic foster home from October 23, 2013 to March 31, 2014; and the Wright School from February 2, 2015 to September 10, 2015. The child experienced no substantial injuries in any of the placements outside of the parents' home.
>
> . . . .
>
> 16. At various times, [Kirk]'s medication regimen has been: Adderall since 2010 for ADHD, ceased when placed with [respondents]; restarted Adderall XR 40mg daily in 2012, and from 2/2015 - 5/2015 he was in residential care at the Wright School where Fluoxetine 10mg daily was added. While at Wright School, [Kirk] was taken off of Depakote and was given Celexa. When discharged from Wright School, [Kirk] was being weaned off of Celexa and Prozac because of stomach pain. [Kirk] was on Adderall

and Prozac at home until the parents let prescription for Prozac lapse on October 29, 2015.

17. The child has had various diagnoses over time, including but not limited to Reactive Attachment Disorder (RAD), PTSD, ADHD, ODD, Adjustment Disorder, and Disruptive Behavior.

18. Durham DSS received a report of abuse on November 9, 2015, stating that: The child has "black and bruising" around the left eye, the child has bruising around the lips, scratches on the bridge of the nose, and below the lips, the child's right pointer finger is swollen from the knuckle to the tip and the side of the fingers on the right hand are punctured. The reporter says that the child is prescribed Adderall and was prescribed Prozac while in the Wright School. The reporter says that upon the child's discharge from the Wright School the parents did not seek a psychiatrist to manage the child's prescriptions and the child has been out of the medications for approximately two weeks. The reporter says that the mother says that the father will have the prescriptions filled. The reporter says that when the child is not taking the Prozac he is irritable and cries. He was without the Prozac from October 30, 2015, until November 10, 2015, at a minimum.

19. At the direction of Durham DSS, the parents took the child to the Duke ER the night of November 9, 2015, because of the injury to the finger. The orthopedic consult found "a moderately displaced fracture of the middle phalanx of the index finger. Minimal clinical deformity and neurovascularly intact. The doctors were unable to determine injury mechanism or age of fracture from x-rays or exam. Being worked up for NAT [non-accidental trauma] due to conflicting stories and bruised chest and eyes." The child received an ED psychiatric evaluation at that time.

. . . .

25. The CME and Dr. Knutson concluded that the child's injuries were not self-inflicted.

26. The discharge recommendations from the Wright School were not followed by the parents.

27. On November 13, 2015, the child had two black eyes, a fractured finger, bruising around his lips, scratches across his nose and a puncture wound on [his] finger. Various conflicting explanations were given for these injuries.

28. It is the recommended and customary practice of CPS investigators to seek out and review prior CPS reports and the investigative records for same. Social Worker Pam Stanton did so in [Kirk's] case, reviewing records of the CPS reports described in paragraph 12 above, and examining photographs of prior injuries found within those records. The patterns of conduct evident in the prior reports were duly considered in DSS's decision to substantiate physical abuse in its most recent investigation. The social worker and her superiors also relied on statements from mother and information gathered since November 15, 2015, the records of the Wright School, and the 2013 and 2015 CANMEC reports, in its substantiation.

29. This Court does not need to determine what is or is not in the parents' hearts or whether or not they love the child. The Court would like to believe they do and have become frustrated in their efforts. However, they are not capable of parenting this child in an appropriate manner. There are too many reports, whether the reports are looked at in isolation or looking at the totality of this child's experience. Because of his emotional difficulties, he is a difficult child to parent, and it appears he did not meet their expectations; and they are unable to meet his needs for appropriate discipline, or emotional and medical nurturing. Perhaps, he needs them to be hypervigilant, and they should be, because of what appears to be a pattern of injuries any conscientious parent would take into account and have more supervision. Given their work schedules and the creation of their own family perhaps they do not have the time or capacity to do what is needed for [Kirk]. The extent of his injuries and the lack of reasonable explanation for them creates a condition which is likely to lead to serious physical injury. While the medical professional is saying more likely than not, the Court believes that the totality of the circumstances is clear and convincing.

30. To make sure that he does not hurt himself, accidentally or deliberately, the parents have a duty to take proper

> precautions. The Court received and credits the testimony of Dr. Herold that children with emotional difficulties who cut and jab themselves do so because the body provides a release of dopamine which has a calming effect. The injuries noted in [Kirk] are not of the kind typically self-inflicted by children seeking this dopamine release. Dr. Herold explained injuries are also possible from regular childhood activities and when children misjudge their capabilities and that this is not self-harm for the purposes of our evaluation.
>
> 31. Various agencies and professionals have attempted to support [respondents] with parenting tools, and sometimes our ways of learning are difficult to change. The belt loop marks from the past are inappropriate.
>
> 32. [Respondent-mother] testified that she no longer physically disciplines [Kirk] for fear of getting in trouble. When asked if she resented the frequent CPS reports concerning her family, she stated that they had resulted in a situation in which she had in her home "a child I can't discipline[.]" Physical punishment has diminishing returns. You cannot beat incorrect behavior out of a child. It is unfortunate that she does not recognize this.
>
> 33. The parents are incapable of learning correct discipline and care at this time. Unless they acknowledge their role in causing this child physical and emotional harm, accept him and his special needs, and commit to the hard work necessary to safely meet those needs, they will likely continue to be unable to parent this child.

Respondent-mother challenges Findings of Fact Nos. 25, 27, and 29 as not supported by the evidence. We address each in turn.

Respondent-mother first challenges Finding of Fact No. 25, in which the court found that the child medical exam (CME) and psychiatrist, Dr. Katherine Hobbs Knutson, concluded that Kirk's injuries were not self-inflicted, as not supported by the evidence. Indeed, neither the CANMEC report nor Dr. Knutson specifically concluded that the injuries presented by Kirk were not self-inflicted. Rather, the CANMEC report and Dr. Knutson expressed concern that Kirk was physically abused because his injuries were not consistent with the typical self-injury behavior of cutting, burning, pinching or hitting, and that it would be rare to cause the extent of physical injury presented by Kirk by hitting himself. The

report and Dr. Knutson then concluded that it was "highly probable" that Kirk was physically abused. During the hearing, Dr. Herold testified that "[p]robable is one step below clear and one step above suspicious," and that she could not "say with 100 percent certainty" that Kirk was physically abused. Because the CANMEC report and Dr. Knutson did not definitively conclude that the injuries were not self-inflicted, but only that they were not consistent with typical self-injurious behavior, we hold Finding of Fact No. 25 is not supported by the evidence.

Respondent-mother challenges the portions of Findings of Fact Nos. 27 and 29 in which the court found that conflicting explanations were given for Kirk's injuries. Respondent-mother argues this finding is not supported by the evidence because once Kirk stated that he hit himself in the eye and caused the bruises, he never wavered from this explanation. Respondent-mother contends that the alleged inconsistencies in the CANMEC report were exaggerated and inaccurate. However, Dr. Herold testified at the hearing that Kirk gave multiple histories for the injuries, including that he was hit by a rake, that he was wrestling with his father, that he was doing cartwheels, that he dropped a weight on his finger, and that he did it to himself.

Stanton also testified at the hearing that Kirk offered multiple explanations for the injury to his finger, including someone stepping on it and playing with a weight, and that Kirk initially said he did not know what happened to his eye, then said he was hit with a rake, and finally stated that he hit himself in the face. In the Center for Child and Family Health report, admitted into evidence at the hearing, the clinician noted that during her interview with respondent-mother in December 2015, respondent-mother "asserted that [Kirk] gave several stories [for his injuries] including a rake hurting him, a friend hurt him, and that he had done it himself because he was worried about being in trouble when asked about how he had hurt his eye."

Further, the CANMEC report indicates that respondent-mother told the clinician that "[w]hen the DSS worker came, [Kirk] kept changing his story." Dr. Herold also concluded in the CANMEC report:

> The histories surrounding [Kirk's] injuries have been inconsistent. The histories have ranged from dropping a weight on his finger, to doing cart wheels, to someone stepping on his finger. With regards to the bruises on his eyes, histories have included being hit by a friend [ ], hitting himself, and getting hit with a rake. When asked about the large bruise on his chest, [Kirk] reported not knowing

> it was there and not knowing how he sustained it. He then reported that he hit himself in the chest as well as him wrestling with his father.

This is competent evidence to support the trial court's findings that Kirk gave inconsistent explanations for his injuries.

Respondent-mother also challenges the portion of Finding of Fact No. 29, in which the court found: "The extent of his injuries and the lack of reasonable explanation for them creates a condition which is likely to lead to serious physical injury. While the medical professional is saying more likely than not, the Court believes that the totality of the circumstances is clear and convincing." Respondent-mother argues that this finding is not supported by the evidence because the evidence supports only a conclusion that it was less than clear that Kirk had been abused. Respondent-mother also challenges Conclusion of Law No. 2, in which the court concluded that the experts were "being cautious" in their assessments that it was only "highly probable" Kirk was physically abused.

The experts based their conclusions that Kirk was physically abused on the extent of the unexplained injuries and their belief that Kirk could not have caused such injuries to himself. However, the trial court appears to base its conclusion that Kirk was abused, in part, on respondents allowing Kirk to cause the injuries to himself. The trial court's findings support this conclusion.

Respondent-mother stipulated, and the trial court found, that she allowed Kirk's Prozac prescription to lapse for a period of time, and respondent-mother admitted to the examining doctors that she believed Kirk's lack of medication caused his behavior problems. The trial court also found that respondents did not follow up with a psychiatrist after his discharge from the Wright School as recommended, and failed to properly supervise Kirk "[t]o make sure that he does not hurt himself." These findings show that despite being aware of Kirk's mental health and behavior issues, respondents failed to provide adequate supervision and properly maintain Kirk's medication which caused his unbalanced behavior in early November. Even if inflicted by Kirk on himself, the injuries were nevertheless the result of physical harm "by other than accidental means" that respondents allowed to occur due to their failure to maintain Kirk's medication and provide adequate supervision to meet Kirk's special needs.

The court also found that Kirk did not experience any substantial injuries in any of the placements outside of respondents' home. This

finding shows that Kirk's other placements were able to provide proper supervision and prevent Kirk from causing any self-harm. It was only in respondents' care that Kirk was able to cause significant injury to himself. Therefore, the trial court's findings support the conclusions that Kirk was abused in that respondents created a substantial risk of physical injury to Kirk by other than accidental means, and that respondents inflicted or allowed to be inflicted on Kirk serious physical injury by other than accidental means.

C. Adjudication of Neglect

[3] Finally, respondent-mother argues the trial court erred in adjudicating Kirk neglected because the evidence and findings of fact did not support such a conclusion. We disagree.

A "neglected juvenile" is defined in relevant part as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare . . . .

N.C. Gen. Stat. § 7B-101(15) (2015).

Respondent-mother first challenges Finding of Fact No. 26, in which the court found that respondents did not follow the discharge recommendations from the Wright School. However, the DSS social worker testified that part of Kirk's discharge plan from the Wright School recommended obtaining a psychiatrist for Kirk, which respondents did not do. As a result, Kirk did not have a doctor to refill his Prozac prescription, and the prescription lapsed for nearly two weeks. This is competent evidence to support the trial court's finding.

Respondent-mother also challenges the trial court's Finding of Fact No. 32, in which it found that respondent-mother thought the frequent CPS reports resulted in her having a child in her home that she could not discipline, and that "it is unfortunate that [respondent-mother] does not recognize" that "[y]ou cannot beat incorrect behavior out of a child." However, because we deem this finding unnecessary to support the adjudication of neglect, we need not address this challenge as any error would not constitute reversible error. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) ("When . . . ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error." (citation omitted)).

The remaining findings are sufficient to support the trial court's conclusion that Kirk is neglected. The trial court found that respondent-mother is "unable to meet [Kirk's] needs for appropriate discipline, or emotional and medical nurturing[,]" did not provide Kirk proper supervision to deal with his emotional difficulties and behavior issues, did not follow the discharge recommendations from the Wright School recommending Kirk see a psychiatrist, and allowed Kirk's prescription for Prozac to lapse for a period of two weeks. Dr. Herold testified at the hearing that "Prozac is not a medication that you want to just stop" and that doing so could cause side effects. These findings show that respondent-mother failed to provide proper supervision for Kirk and failed to keep his medication current.

Additionally, in her brief respondent-mother admitted that the trial court's Findings of Fact Nos. 29–30 and 32–33 "tracked the definition of neglect" while arguing that they did not support an adjudication of abuse. We hold the trial court's findings support its conclusion that Kirk is a neglected juvenile in that respondents failed to provide proper supervision for Kirk.

III. Conclusion

For the reasons stated above, we affirm the trial court's adjudications of abuse, neglect, and dependency. Respondent-mother has not raised any issues on appeal pertaining to the disposition order.

AFFIRMED.

Judges HUNTER, JR. and ZACHARY concur.

IN RE M.B.

[253 N.C. App. 437 (2017)]

IN THE MATTER OF M.B.

No. COA16-1165

Filed 16 May 2017

1. Appeal and Error—mootness—requirements of Interstate Compact on Placement of Children—guardian returned to North Carolina

Although respondent mother argued in a child guardianship case that the trial court erred by appointing the paternal great grandmother as the minor child's guardian without first complying with the requirements of the Interstate Compact on the Placement of Children (ICPC), the issue of the applicability of the ICPC was rendered moot by the great grandmother's return to North Carolina. Respondent failed to show an exception to the mootness doctrine.

2. Guardian and Ward—parental rights—visitation suspended until mental health stabilized

The trial court did not err by allegedly failing to designate what parental rights, if any, respondent mother retained following the establishment of the minor child's guardianship. A parent's rights and responsibilities, apart from visitation, are lost if the order does not otherwise provide. The trial court's order specifically provided that respondent's visitation with the minor child was suspended until she showed that her mental health stabilized.

Appeal by respondent-mother from order signed 29 August 2016[1] by Judge William A. Marsh, III in Durham County District Court. Heard in the Court of Appeals 3 May 2017.

Senior Assistant Durham County Attorney Robin K. Martinek for petitioner-appellee Durham County Department of Social Services.

Miller & Audino, LLP, by Jeffrey L. Miller, for respondent-appellant mother.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

1. The trial court signed the order on 26 August 2016; however, the file stamp is illegible and, as a result, we cannot determine when the order was formally entered.

ZACHARY, Judge.

Ms. E.B. ("respondent") appeals from an order establishing a guardianship for her minor child M.B. ("Max").[2] We affirm.

I. Background

The Durham County Department of Social Services ("DSS") initiated the underlying juvenile case on 10 December 2012, when it obtained non-secure custody of Max and filed a petition alleging that he was a neglected and dependent juvenile. The trial court adjudicated Max to be a dependent juvenile by order entered 16 January 2013. In its disposition order entered 15 March 2013, the trial court continued custody of Max with DSS, granted respondent weekly supervised visitation with Max, and ordered respondent to: (1) obtain substance abuse and mental health evaluations and follow any recommendations; (2) establish and maintain mental health services and comply with all recommendations; (3) submit to testing for Huntington's disease; (4) obtain stable housing and a stable source of income; and (5) participate in a parenting program. *In re M.B.*, __ N.C. App. __, 782 S.E.2d 785 (2016) (unpublished) ("*M.B. I*")

The court initially set the permanent plan for Max as reunification with a parent, but respondent's mental health deteriorated and she failed to comply with the trial court's orders. *See M.B. I.* On 3 April 2014, the trial court appointed a guardian ad litem ("GAL") for respondent, finding that she lacked sufficient capacity to proceed on her own behalf. In an order entered 28 May 2014, the court ceased reunification efforts with respondent and changed the permanent plan for Max to custody with Ms. J.M. ("Ms. Metz"), his paternal great-grandmother, with an alternative plan of reunification with respondent. Max has lived in the home of Ms. Metz "continuously since June 6, 2014, during which time [Ms. Metz] has been both a placement provider and a guardian of the child." By order entered 15 December 2014, the trial court changed Max's permanent plan to guardianship with Ms. Metz, appointed Ms. Metz as his guardian, and suspended respondent's visitation until she could show that "her mental health has stabilized."

Respondent attempted to appeal from the trial court's 15 December 2014 order, but the trial court dismissed her appeal. By order entered 28 May 2015, this Court issued a writ of certiorari to review both the 15 December 2014 permanency planning review order and the order dismissing respondent's appeal. In our opinion in *M.B. I*, this Court

2. We have used pseudonyms to protect the juvenile's identity and for ease of reading.

affirmed the trial court's order dismissing respondent's appeal of right, but vacated and remanded the trial court's permanency planning order because the court had failed to verify that Ms. Metz had adequate financial resources to care for Max.

On 8 August 2016, the trial court conducted another permanency planning review hearing, wherein it considered further evidence of Ms. Metz's financial ability to care for Max. On 26 August 2016, the trial court signed an order appointing Ms. Metz as Max's guardian. In its order, the court found that Ms. Metz, Max, and other members of Ms. Metz's family were living in Cleves, Ohio. The court further found that Ms. Metz had adequate resources to care for Max and that she understood the legal rights and responsibilities she would have as Max's guardian. The court directed respondent to participate in services recommended by DSS, suspended respondent's visitation with Max until she showed to the court that her mental health had stabilized, ceased further reviews in the juvenile case, and released DSS, Max's GAL, and the parties' counsel of further duties. Within a month of the entry of this order, Ms. Metz moved back to Durham, North Carolina. Accordingly, when respondent filed a notice of appeal, she served it on Ms. Metz at her address in Durham, North Carolina.

II. Interstate Compact on the Placement of Children

[1] Respondent first argues that the trial court erred by appointing Ms. Metz as Max's guardian without first complying with the requirements of the Interstate Compact on the Placement of Children ("ICPC" or "Compact"). Respondent contends that because Ms. Metz "was a resident of Ohio at the time" of the entry of the permanency planning order, the trial court's order must be "reversed and vacated, and this matter should be remanded for compliance with the ICPC[.]" We conclude that this argument has been rendered moot by Ms. Metz's return to North Carolina.

An issue "is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Black's Law Dictionary 1008 (6th ed. 1990). 'Courts will not entertain or proceed with a cause merely to determine abstract propositions of law.' " *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (quoting *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978)). "It is well-established that 'courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate

academic matters, provide for contingencies which may hereafter rise, or give abstract opinions.' " *In re Accutane Litig.*, 233 N.C. App. 319, 326, 758 S.E.2d 13, 19 (2014) (quoting *Baxter v. Jones*, 283 N.C. 327, 332, 196 S.E.2d 193, 196 (1973)). For example, in *In re Stratton*, 159 N.C. App. 461, 583 S.E.2d 323, *appeal dismissed*, 357 N.C. 506, 588 S.E.2d 472 (2003), the respondent appealed from an adjudication of neglect and dependency. During the pendancy of the appeal, respondent's parental rights to the child were terminated. This Court dismissed the respondent's appeal as moot, holding that the "questions raised by [respondent] on this appeal are now academic given [the trial court's] order terminating his parental rights." *Stratton*, 159 N.C. App. at 463, 583 S.E.2d at 324.

In the present case, appellee DSS contends that we should dismiss as moot respondent's argument that the trial court erred by failing to comply with the ICPC prior to designating Ms. Metz as Max's guardian. DSS argues that because "the Guardian has moved back to North Carolina, there is no longer an issue of controversy related to the ICPC." Respondent has requested that this case be remanded for "for further proceedings consistent with the ICPC." We agree with DSS that "[s]ince the ICPC no longer applies, there is no hearing for the [trial court] to conduct in accordance with the ICPC."

We note that respondent's appeal on this issue is premised on the fact that "[Ms. Metz] was a resident of Ohio *at the time*" that the permanency planning order was entered. (emphasis added). At no point in her appellate brief does respondent contend that Ms. Metz continues to reside in Ohio, and respondent has not disputed DSS's assertion that Ms. Metz no longer lives in Ohio. Moreover, review of the record shows that respondent served her notice of appeal on Ms. Metz at 606 Hugo Street, Durham, North Carolina, 27704. Thus, respondent clearly is aware that Ms. Metz returned to North Carolina shortly after the entry of the order from which she appeals. In addition, respondent does not argue that the facts of this case fall within an exception to the mootness doctrine. We conclude that the issue of the applicability of the ICPC has been rendered moot by Ms. Metz's return to North Carolina. Accordingly, we do not address this issue.

III. Parental Rights Retained by Respondent

[2] Respondent also argues that the trial court erred in failing to designate what parental rights, if any, she retained following the establishment of the guardianship. Respondent contends that the trial court failed to comply with the requirements of N.C. Gen. Stat. § 7B-906.1(e)(2) (2015), which provides that:

> (e) At any permanency planning hearing where the juvenile is not placed with a parent, the court shall additionally consider the following criteria and make written findings regarding those that are relevant:
>
> . . .
>
> (2) Where the juvenile's placement with a parent is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established and, if so, the rights and responsibilities that should remain with the parents.

On appeal, respondent asserts that the trial court was required to make findings about her rights in regard to the following:

> [A]mong the intended rights for consideration and designation by the court are: (1) the right to attend or know about health care procedures for Max; (2) the right to communicate with the guardian about Max; (3) the right to attend special events in which Max was a participant; (4) the right to know about changes in Max's address or custody; (5) the right to know about Max's illnesses and prescribed treatments; (6) the right to know about Max's progress in school; and, (7) the right to send gifts for Christmas and birthdays.

Respondent has not cited any authority or offered any legal argument in support of her assertion that the rights identified by respondent are "among the intended rights for consideration and designation by the court." Nor has respondent cited any authority holding, as respondent appears to contend, that the trial court was required to make specific findings about every right that respondent might possibly retain. Respondent asserts that N.C. Gen. Stat. § 7B-906.1(e)(2) "requires the lower court to establish the rights and responsibilities" that remain with a respondent following the establishment of a guardianship, and cites *In re R.A.H.*, 182 N.C. App. 52, 641 S.E.2d 404 (2007), for the proposition that "failure to make findings about these rights is reversible error." *R.A.H.* did not, however, articulate a general rule on the extent to which a trial court is required to address specified rights that a parent might retain after guardianship is established. In *R.A.H.* the record showed that the trial court had placed responsibility for determining the appellant's visitation rights with the minor child's guardian. We noted that the trial court may not delegate its responsibility for awarding visitation and remanded "on that issue to the trial court for clarification[.]" *R.A.H.*, 182

N.C. App. at 61, 641 S.E.2d at 410. *R.A.H.* does not support respondent's contention that the trial court was required to make extensive findings on a number of possible "rights" of a parent. *See also In re T.R.M.*, 188 N.C. App. 773, 780, 656 S.E.2d 626, 631 (2008) (holding under identical language of a prior statute, N.C. Gen. Stat. § 7B-907(b)(2) (2007), that in granting guardianship of a child to the child's grandparents, the trial court sufficiently addressed the respondent-mother's rights and responsibilities "by providing her visitation rights and clear guidance as to the limitations upon those visitation rights").

Respondent would append to N.C. Gen. Stat. § 7B-906.1(e)(2) an additional requirement that a trial court make findings that constitute individual decisions on whether a parent retains every right or responsibility the parent had prior to the grant of custody or guardianship. We conclude that when a child is placed in the custody or guardianship of another person, the parent's rights and responsibilities, apart from visitation, are lost if the trial court's order does not otherwise provide.

Here, the trial court's order specifically provided that respondent's visitation with Max shall remain suspended until she shows that her mental health has stabilized. The court did not list any other right or responsibility that respondent retained to Max, and thus she retained none. Accordingly, we find the trial court complied with the requirements of N.C. Gen. Stat. § 7B-906.1(e)(2), and we overrule this argument.

Respondent does not otherwise challenge the trial court's order granting guardianship of Max to Ms. Metz, and we affirm the order.

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

IN RE T.K.

[253 N.C. App. 443 (2017)]

IN THE MATTER OF T.K.

No. COA16-1047

Filed 16 May 2017

Jurisdiction—subject matter jurisdiction—juvenile delinquency—juvenile court counselor signature—approved for filing language

The trial court erred by adjudicating a juvenile as delinquent where there was no subject matter jurisdiction. The second petition alleging the juvenile delinquent lacked the requisite signature and "Approved for Filing" language from the juvenile court counselor.

Judge STROUD concurring.

Appeal by Juvenile-Appellant from orders entered 26 May 2016 by Judge Les Turner in Wayne County District Court. Heard in the Court of Appeals 7 March 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Appellate Defendant Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Juvenile-Appellant.

INMAN, Judge.

The omissions of a signature by a juvenile court counselor, or other appropriate representative of the State, and the words "Approved for Filing" in a petition in a juvenile delinquency case amount to a jurisdictional error that precludes the district court's authority to consider the matter contained within the petition.

T.K. (Thomas),[1] Juvenile-Appellant, appeals from orders adjudicating him delinquent and imposing a level 2 disposition placing him on twelve months of probation and requiring him to perform 30 hours of community service. Thomas argues that because the petition lacked the requisite signature and "Approved for Filing" language from the juvenile court counselor, the district court lacked jurisdiction to hear the matter.

1. A pseudonym is used to protect the identity of the juvenile.

After careful consideration, we agree and vacate the trial court's orders and dismiss the petition.

Facts and Procedural Background

At the beginning of the school day on Saint Patrick's Day 2016, before the start of first period, a behavioral specialist at Goldsboro High School, Tamoris Wooten, stood watch in the hallway as the students headed to class. Thomas, walking away from a "ruckus" down the hall, approached Wooten, told him, "I'm going to stand right here," and stated "Sir, I'm not trying to get in trouble this morning." Before Wooten could ask Thomas any questions about what he meant, a second student, Brad,[2] walked up to Thomas, said a few words, and punched Thomas in the face. Thomas dropped to the floor.

Thomas tried unsuccessfully to climb to his feet while Brad continued punching him. A crowd of around 25 to 30 students gathered around them. Wooten called for staff assistance. Thomas "put his arm up to get [Brad] off of him," and threw one or two punches. Another male staff member helped Wooten separate the boys and Wooten walked with Thomas away from the fight.

As Wooten led Thomas away down the hall to his office, Thomas uttered what was later described as "profanity." Wooten instructed Thomas to stop cursing and to calm down. Thomas stopped cursing by the time they reached Wooten's office and Wooten left him in his office to calm down.

On 26 April 2016, Officer Nicki Artis of the Goldsboro Police Department submitted a complaint with the Clerk of Wayne County Superior Court alleging that Thomas was delinquent because he committed a simply affray, a Class 2 misdemeanor, in violation of N.C. Gen. Stat. § 14-33(a) at his school on 17 March 2016. On 5 May 2016, a juvenile court counselor signed the complaint and marked it "Approved for Filing" as a petition. The petition was then filed with the Wayne County District Court and the matter was scheduled for hearing on 26 May 2016.

On the day of the hearing, Officer Artis signed a second petition related to the same incident, alleging that Thomas was delinquent because he committed disorderly conduct at school. This second petition alleged that Thomas had disturbed the discipline at Goldsboro High School by "arguing loudly in a Goldsboro High School hallway with

2. A pseudonym is used to protect the identity of the juvenile.

another student, [Brad], which ultimately led to a physical altercation . . . .” This second petition was not signed by a court counselor, nor was it marked as “Approved for Filing,” but it was nevertheless filed with the district court.

During the hearing, the State dismissed the simply affray charge and proceeded only on the disorderly conduct petition. The trial court adjudicated Thomas delinquent for disorderly conduct, imposed a Level 2 disposition, ordered Thomas to be placed on a 12 month probation, and ordered him to perform 30 hours of community service.

Thomas timely appealed.

Analysis

Before a court can address any matter on the merits, it must have jurisdiction. Thomas asserts that the trial court lacked subject matter jurisdiction to consider the second petition filed against him because the juvenile court counselor failed to sign the petition and mark whether the petition was “Approved for Filing” as required by N.C. Gen. Stat. § 7B-1703. We agree.

“A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.” *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (citation omitted). “Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]” *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (citations omitted).

“Our General Assembly ‘within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State.’ ” *Id.* (quoting *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941)). “Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction.” *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). “[W]here it is required by statute that [a] petition be signed and verified, these essential requisites must be complied with before the petition can be used for legal purposes.” *In re Green*, 67 N.C. App. 501, 503, 313 S.E.2d 193, 194-95 (1984) (citation omitted).

The General Assembly, by enacting the Juvenile Code, imposed specific requirements that must be satisfied before a district court obtains

jurisdiction in juvenile cases. For a petition alleging a juvenile delinquent, the Juvenile Code states that

> [e]xcept as provided in [N.C. Gen. Stat. §] 7B-1706, if the juvenile court counselor determines that a complaint should be filed as a petition, the counselor shall file the petition as soon as practicable, but in any event within 15 days after the complaint is received, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall assist the complainant when necessary with the preparation and filing of the petition, *shall include on it the date and the words "Approved for Filing", shall sign it*, and shall transmit it to the clerk of superior court.

N.C. Gen. Stat. § 7B-1703 (2015) (emphasis added). This Court has stated that "[w]e cannot overemphasize the importance of the intake counselor's evaluation in cases involving juveniles alleged to be delinquent or undisciplined." *In re Register*, 84 N.C. App. 336, 346, 352 S.E.2d 889, 894-95 (1987). The role of the counselor is "to ensure that the needs and limitations of the juveniles and the concern for the protection of public safety have been objectively balanced before a juvenile petition is filed initiating court action." *Id.* at 346, 352 S.E.2d at 895. Our courts have not previously addressed whether the signature and the "Approved for Filing" designation on a juvenile petition are prerequisites to the district court's jurisdiction.

In *In re D.S.*, 364 N.C. 184, 194, 694 S.E.2d 758, 764 (2010), the North Carolina Supreme Court held that the Legislature did not intend the time deadlines imposed by N.C. Gen. Stat. § 7B-1703 to "function as [a] prerequisite[] for district court jurisdiction over allegedly delinquent juveniles." The Court looked to the Legislature's intent in imposing the deadline at issue in that case. *Id.* at 192, 694 S.E.2d at 763. The Court further noted that its decision was "consistent with the conclusions reached in prior North Carolina appellate decisions that have addressed Chapter 7B timeline requirements and jurisdiction, particularly in the context of abuse, neglect, and dependency and termination of parental rights." *Id.* at 194, 694 S.E.2d at 764 (citations omitted). *In re D.S.* does not address whether the statute's requirements for signature and approval for filing by a juvenile court counselor or other appropriate representative of the State are prerequisites to district court jurisdiction.

In the absence of precedent on the precise issue before us, we turn to analogous case authority for guidance. In a case involving a petition

to adjudicate a juvenile as abused or neglected, this Court held that "the failure of the petitioner to sign and verify the petition before an official authorized to administer oaths rendered the petition fatally deficient and inoperative to invoke the jurisdiction of the court over the subject matter." *In re Green*, 67 N.C. App. 504, 313 S.E.2d at 195 (vacating the trial court's denial of a motion to dismiss because "the trial court lacked jurisdiction over the subject matter"). In *In re Green*, the Juvenile Code required the petition alleging abuse and neglect to be signed and verified pursuant to N.C. Gen. Stat. § 7A-544 and N.C. Gen. Stat. § 7A-561(b).[3] *Id.* Because the petition lacked the necessary signatures and verification, our Court concluded that the trial court necessarily lacked jurisdiction over the matter. *Id.*

The State urges us to extend the holding in *In re D.S.* to recognize failures to comply with the signature and "Approved for Filing" requirements for a petition alleging delinquency as non-jurisdictional errors. Such an extension would conflict with the purpose of the Juvenile Code. Section 7B-1500 articulates the following purposes and policies underlying the statutes related to delinquent juveniles:

> (1) To protect the public from acts of delinquency.
>
> (2) To deter delinquency and crime, including patterns of repeat offending:
>
> a. By providing swift, effective dispositions that emphasize the juvenile offender's accountability for the juvenile's actions; and
>
> b. By providing appropriate rehabilitative services to juveniles and their families.
>
> (3) *To provide an effective system of intake services for the screening and evaluation of complaints* and, in appropriate cases, where court intervention is not necessary to ensure public safety, to refer juveniles to community-based resources.
>
> (4) To provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders to proceed

3. The relevant sections of N.C. Gen. Stat. § 7A have been re-codified under N.C. Gen. Stat. § 7B and are sufficiently similar for our purposes.

> with all possible speed in making and implementing determinations required by this Subchapter.

N.C. Gen. Stat. § 7B-1500 (2015) (emphasis added). The juvenile court counselor's role in signing and approving a petition for delinquency is the only indication on the face of a petition that a complaint against a juvenile has been screened and evaluated by an appropriate authority. Not unlike the signature of a Grand Jury foreperson with the indication "true bill" on an indictment sought by a prosecutor, the juvenile court counselor's signature and approval for filing on a petition reflects that the complaint has not simply been asserted, but that it has satisfied the first test of validity in the court system.

Consistent with our precedent in *In re Green*, the Supreme Court's precedent in *In re D.S.*, and the Legislature's intent in drafting the Juvenile Code, we conclude that a petition alleging delinquency that does not include the signature of a juvenile court counselor, or other appropriate representative of the State,[4] and the language "Approved for Filing," the petition fails to invoke the trial court's jurisdiction in the subject matter.

Here, the petition alleging Thomas delinquent for disorderly conduct at school failed to include a signature from the juvenile court counselor and does not indicate whether or not it was "Approved for Filing." The trial court therefore was without jurisdiction to proceed on the merits of this petition. Because we conclude that the trial court lacked subject matter jurisdiction, we deem it unnecessary to discuss Thomas's other assignments of error.

VACATED AND DISMISSED.

Judge BRYANT concurs.

Judge STROUD concurs by separate opinion.

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4. N.C. Gen. Stat. § 7B-1704 (2015) provides an alternate route for the district court's jurisdiction when a juvenile counselor denies approval of filing a petition. In such instances, the district attorney may approve the filing if the record affirmatively discloses that the juvenile counselor denied the approval. *See In re Register*, 84 N.C. App. at 343-44, 352 S.E.2d at 893. Our ruling today does not address and should not interfere with the appeal process delineated in N.C. Gen. Stat. §§ 7B-1704 or 7B-1705.

STROUD, Judge, concurring.

I concur in the result reached by the majority, since I tend to agree that the juvenile court counselor's signature on the petition may be necessary to invoke jurisdiction, although I also note that the juvenile court counselor was present and participating in the hearing. I write separately to concur because I believe that even if the court had jurisdiction, the adjudication and disposition orders would have to be reversed. It is unusual for a concurring opinion to address an issue which perhaps need not be addressed since the adjudication is being vacated. Yet I also recognize the possibility of further appellate review and feel compelled to note other errors in this adjudication and disposition.

Mr. Tamoris Wooten, a behavioral specialist at Goldsboro High School testified that Thomas told him he had prior juvenile court involvement, but on the day of this incident, was almost done with his probation. No doubt Thomas had been encouraged during his involvement with juvenile court not to engage with other students who may cause a "ruckus" and instead to seek assistance from school personnel if problems occurred. Indeed, when a "ruckus" did occur, Thomas did exactly "the right thing" -- as the lower court even noted -- by going directly to Mr. Wooten to try to protect himself and avoid getting into trouble. But then, right in front of Mr. Wooten, another student punched Thomas in the face and attempted to continue punching him as he was on the ground.

After another staff member arrived and the boys were separated, Mr. Wooten began walking with Thomas to the office and "was talking to him to try to find out what was going on." Thomas said something Mr. Wooten described as profanity. Mr. Wooten could not remember any particular words or phrases Thomas used. Mr. Wooten told Thomas to stop cursing and he did. There is no evidence that anyone other than Mr. Wooten even heard Thomas, though the hallway they were walking down did have many other students in it.

Perhaps another student, instead of cursing, would have instead cried; both are noises which may attract the attention of other students or school personnel. Since we don't know what the words were, really, all we know is that he made a noise. But there is no doubt Thomas's exclamation -- whatever he said -- was a response to an attack by another student; it was not something initiated by Thomas with the intent to "[d]isrupt[], disturb[] or interfere[] with the teaching of students . . . or disturb[] the peace, order or discipline" of the school, which is a

necessary element of the offense for which he was adjudicated as delinquent. N.C. Gen. Stat. § 14-288.4(a)(6) (2015).

Once Thomas had calmed down, he told Mr. Wooten that he and the other student were "in the neighborhood" and had some sort of disagreement a week or so earlier. On the morning of the incident, the issue "just started to boil back up and they were having words with each other" in the cafeteria. Thomas then sought out Mr. Wooten to avoid any trouble, and later in the office, told Mr. Wooten "he didn't want to get in trouble because he was just coming off from being in trouble with probation and stuff." Mr. Wooten explained what he was thinking when he was talking to Thomas, "So I'm saying, okay, here's a kid that's maybe trying to make the right decision. So then at that point, then I left it alone and I stepped out of the room where he was and left him."

Though Mr. Wooten had no prior dealings with Thomas and had only been at this particular school for two days, he also testified about his role as a behavioral specialist and noted that he tries to teach students to turn to him for help:

> I say, you know, 'Walk away and let an administrator or let me know, and let us deal with those type of things instead of you guys trying to fight your battles. That's why I'm here, and that's why the administration is here. But you guys have got to understand' -- I say, 'Stop trying to gain hallway cred, which means you're trying to establish credibility with your friends in the hallway. It's okay to walk away. That doesn't make you a coward. That doesn't make you, as they say, a punk. That doesn't make you soft. It makes you smart. And if you do it this way, then the outcome could be different for you when we start to do the investigation on what discipline needs to be given out.'

Thomas did exactly that -- he walked away from the issue in the cafeteria and went to Mr. Wooten for help.

As noted by the majority, the simple affray petition was dismissed, leaving the disorderly conduct at school ("disorderly conduct") petition which was unsigned by the court counselor. The disorderly conduct petition alleged that Thomas had violated North Carolina General Statute § 14-288.4(a)(6) by "arguing loudly in a Goldsboro High School hallway with another student, [Brad], which ultimately led to a physical altercation in the Goldsboro High School hallway[.]" We do not know from the adjudication order exactly what conduct the lower court based the adjudication upon, because the section of the form which is

to include findings of fact for those facts "proven beyond a reasonable doubt" is entirely blank.

But upon adjudicating Thomas as delinquent, the trial court stated the reasons for adjudication, and it was based solely upon Thomas's use of profanity:

> You did everything right except one thing, close your mouth. You walked away. That's the right thing to do. You went and found the gentleman. That was absolutely the right thing to do. This kid that came up and blindsided you and punched you, that was wrong. Putting up your arm while you were on the floor, that's self-defense. It depends on how many punches you threw back before you crossed the line of engaging in the fight rather than self-defense, but that issue is not before me.
>
> The main reason I adjudicated you is because you were engaging in the verbal aspect coming down the hall, and then after you were punched with the profanity. You've just got to be a bigger man. I know. I understand anger. I understand you might want to let it rip with profanity. You don't want anybody talking junk to you. The gentleman said a little pride might have been involved. You did everything right except refrain from talking, the running of the mouth and then the cussing.

Ultimately Thomas was adjudicated under North Carolina General Statute § 14-288.4(a)(6) which provides:

> (a) Disorderly conduct is a public disturbance intentionally caused by any person who . . .
>
> . . . .
>
> (6) [d]isrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C. Gen. Stat. § 14-288.4(a)(6).

Although the petition cites only conduct *prior* to the "physical altercation" –"arguing loudly in a . . . hallway" – the lower court seemingly

adjudicated Thomas based only on conduct which occurred *after* the altercation, his "cussing," because there was no evidence Thomas used "profanity" or engaged in "cussing" before the physical altercation as the petition alleged. Thus, even assuming that after the altercation Thomas "cussed" loudly where many students could hear, there was also simply no evidence that by his cursing he intentionally sought to "disrupt[], disturb[], or interfere[] with the teaching of students" or that he intentionally "disturb[ed] the peace, order or discipline" of the school. Mr. Wooten was the only witness for the State and nothing in his testimony indicates Thomas used profanity or cursed for any reason other than the fact that he had just been punched in the face. Indeed, Mr. Wooten testified that Thomas was likely "cursing and making noise" due in part to adrenaline -- an adrenaline rush most people would likely experience if suddenly punched in the face.

Several cases which have addressed disorderly conduct in a school demonstrate the necessity of the evidence of intentional disruption of the educational process in the school. *See generally State v. Wiggins*, 272 N.C. 147, 158 S.E.2d 37 (1967); *State v. Midgett*, 8 N.C. App. 230, 174 S.E.2d 124 (1970); *In re M.J.G.*, 234 N.C. App. 350, 759 S.E.2d 361 (2014). In *State v. Wiggins*, our Supreme Court considered convictions arising from a group picketing and marching in front of a school during the school day when classes were in progress. 272 N.C. 147, 155, 158 S.E.2d 37, 43 (1967). The evidence showed that the picketing substantially interrupted the school's operations:

> The marchers carried placards or signs. These signs were utterly meaningless except on the assumption that they related to some controversy between the defendants and the administration of the school, specifically Principal Singleton. Presumably, they were deemed by the defendants sufficient to convey some idea to students or teachers in the school. The site was the edge of a rural road running in front of the school grounds, with only two residences in the vicinity. There is nothing to indicate that the marchers intended or desired to communicate any idea whatsoever to travelers along the highway, or to any person other than students and teachers in the Southwestern High School. As a direct result of their activities, the work of the class in bricklaying was terminated because the teacher could not retain the attention of his students, and

> disorder was created in the classrooms and hallways of the school building itself.

Id.

The defendants in *Wiggins* argued that the statute under which they were convicted was too vague and indefinite to be enforced. *See id.* at 153, 158 S.E.2d at 42. The Court rejected this argument and noted that the statute was clear:

> When the words 'interrupt' and 'disturb' are used in conjunction with the word 'school,' they mean to a person of ordinary intelligence a substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled. We found no difficulty in applying this statute, in accordance with this construction, to the activities of a group of white defendants in *State v. Guthrie*, 265 N.C. 659, 144 S.E.2d 891. Obviously, the statute applies in the same manner regardless of the race of the defendant. *In State v. Ramsay*, 78 N.C. 448, in affirming a conviction for the similar offense of disturbing public worship, this Court, speaking through Smith, C.J., said:
>
> > 'It is not open to dispute whether the acts of the defendant were a disturbance in the sense that subjects him to a criminal prosecution, and that the jury was warranted in so finding, when they had the admitted effect of breaking up the congregation and frustrating altogether the purposes for which it had convened.'
>
> Giving the words of G.S. 14—273 their plain and ordinary meaning, it is apparent that the elements of the offense punishable under this statute are: (1) Some act or course of conduct by the defendant, within or without the school; (2) an actual, material interference with, frustration of or confusion in, part or all of the program of a public or private school for the instruction or training of students enrolled therein and in attendance thereon, resulting from such act or conduct; and (3) the purpose or intent on the part of the defendant that his act or conduct have that effect.

Id. at 154, 158 S.E.2d at 42-43.

Another case that illustrates an intentional interruption of a school is *State v. Midgett*, wherein the defendants

> entered the office of the secretary while the principal, Mr. Simmons, was away from the school; the secretary knew or recognized most of the boys who were there; they informed her that 'they were going to interrupt us that day' and she could either leave or stay in the room, but that she could not pass in and out as she normally did; and that if she stayed she could make such telephone calls as she wished. The secretary telephoned Mr. Simmons and then went to get Mr. Hunter, who normally was in charge in Mr. Simmons' absence. While she was gone, her room was locked, and she was not permitted to return to her office. According to the testimony, filing cabinets and tables were moved against the doors and interior windows to further bar entry.
>
> Daniel Williams testified that he was teaching a class across the hall from the office at the time of the incident He stated that he left that class to investigate the incident at the office and did not resume teaching that day.
>
> Principal Simmons testified that when he returned to the school a little before 12 noon, he found that the office doors were locked and the bell system was being actuated manually from within the office. He determined that the 'presence of persons who were not enrolled' and 'commotion' necessitated the dismissal of school, and therefore he ordered the children walked to the buses and sent them home a little after noon and prior to the usual closing.

8 N.C. App. at 231, 174 S.E.2d at 126. This Court determined that this evidence showed a substantial interference with the school. *Id.* at 233-34, 174 S.E.2d at 127-28.

Here, the State has two deficiencies in its evidence: both the intention to disturb and an actual disturbance. *See* N.C. Gen. Stat. § 14-288.4(a)(6). First, there is no evidence that Thomas's behavior – "cussing" – was intended to disturb school as his brief "cussing" was a response to being attacked. *See id.* Thomas stopped "cussing" when Mr. Wooten told him to; if his intent was to disrupt the school he likely would have gone on "cussing." Thomas was the victim here, and thus this case stands in stark contrast to *In re M.J.G.*, where a student cursed at teachers and the disposition against him was affirmed. *Contrast In re M.J.G.*, 234 N.C.

App. at 351-52, 759 S.E.2d at 362-63 ("The juvenile began shouting, 'I'm tired of this f'ing school, these teachers lying on me, they're always lying on me.' The juvenile put his finger less than an inch away from Long's face, 'postured up chest to chest' and said '[e]specially you you motherf***ing b****[.]' Thereafter, the juvenile backed Ms. Potts against a wall and 'did the exact same thing to her.' ").

Second, there was no evidence of disruption or interruption of the school by Thomas's cursing. Thomas was accompanied by Mr. Wooten, the behavioral specialist, to the office. Thomas did not take Mr. Wooten away from his work duties; helping Thomas was Mr. Wooten's work duty. There was no evidence of involvement by any teachers, other than the one who helped to pull Thomas's attacker off of him and the principal who dispersed students who wanted to see the "fight" Brad started when he attacked Thomas. Mr. Wooten testified that the incident occurred "as the bell rung for them to begin to go to first period" so it appears that classes had not even begun yet which is why so many students were still in the hallway. Thus, at best for the State, some students or others in the school may have heard Thomas cursing in the hall, but there is no evidence of interruption of any class or school activity. In this regard, this case is similar to *In re Eller*, in which our Supreme Court determined there was no evidence of disorderly conduct at school when the juvenile made an aggressive move toward another student and later banged on a radiator in the classroom:

> Greer ma[d]e a move toward another student, who was separated by an aisle, causing the other student to dodge Greer's move. Ms. Weant finished relating the assignment, then approached Greer and asked Greer to show her what was in Greer's hand. Greer thereupon "willingly" and without delay gave Ms. Weant a carpenter's nail. The other students observed the discussion and resumed their work when so requested by Ms. Weant[, and on a later date,]
>
> . . . Greer and Eller were seated at the rear of the classroom with their peers in a single, horizontal row parallel to the rear wall situated near a radiator located on the wall. During the course of their instruction time, Greer and Eller "more than two or three times" struck the metal shroud of the radiator. Ms. Weant testified that she saw each child strike the radiator at least once. Each time contact was made, a rattling, metallic noise was produced that caused the other students to look "toward where the sound was coming from" and caused Ms. Weant

> to interrupt her lecture for fifteen to twenty seconds each time the noise was made. Ms. Weant did not intervene other than to silently stare at Greer and Eller for fifteen to twenty seconds and then resume her teaching. She did, however, report the incident to the school principal that afternoon or the following day.

331 N.C. 714, 715-16, 417 S.E.2d 479, 480–81 (1992).

The Supreme Court determined that this evidence did not support a finding of disruption of the school:

> Respondents' behavior in the instant case pales in comparison to that encountered in *Wiggins* and *Midgett*, and those cases are readily distinguishable on their facts. Here, even the small classes in which respondents perpetrated their disruptive behavior were not interrupted for any appreciable length of time or in any significant way, and the students' actions merited only relatively mild intervention by their teacher. We agree with respondents that while egregious behavior such as that condemned in *Wiggins* and *Midgett* is not required to violate N.C.G.S. § 14–288.4(a)(6), more than that present in the case at bar is necessary.

Id. at 719, 417 S.E.2d at 482–83.

Thomas's behavior here "pales in comparison to that encountered in *Wiggins* and *Midgett*" and even *Eller*. *Id.* at 715-16, 417 S.E.2d at 480-81. There is no evidence that Thomas's cursing in the hall caused *any* disruption. Thus, even assuming the petition had been signed invoking jurisdiction, the adjudication and disposition orders would necessarily need to be reversed. Furthermore, as to the disposition order specifically, even the State concedes that the disposition order is in error since it has no findings whatsoever to support the disposition.

For the reasons noted above, I concur with the majority opinion vacating the adjudication and disposition orders for lack of subject matter jurisdiction, but even assuming the lower court had jurisdiction to hear this case, I would reverse since there was no evidence Thomas violated North Carolina General Statute § 14-288.4(a)(6).

LOCKLEAR v. CUMMINGS

[253 N.C. App. 457 (2017)]

MARJORIE C. LOCKLEAR, PLAINTIFF
v.
MATTHEW S. CUMMINGS, M.D., SOUTHEASTERN REGIONAL MEDICAL CENTER, DUKE UNIVERSITY HEALTH SYSTEM AND DUKE UNIVERSITY AFFILIATED PHYSICIANS, INC., DEFENDANTS

No. COA16-1015

Filed 16 May 2017

1. Medical Malpractice—motion to dismiss—Rule 9(j) certification—ordinary negligence

The trial court erred by dismissing the complaint of plaintiff patient, who fell off a surgical table during surgery, against all defendants under N.C.G.S. § 1A-1, Rules 12(b)(6) and 9(j) where plaintiff's claims were for ordinary negligence and not medical malpractice. Plaintiff was not required to comply with Rule 9(j). Further, the Court of Appeals did not improperly supplement plaintiff's complaint by addressing Rule 9(j) certification since it was necessary to determine whether the trial court erred in dismissing plaintiff's complaint under Rule 9(j).

2. Process and Service—improper service—private process service—no evidence sheriff unable to fulfill duties

The trial court did not err by dismissing plaintiff patient's negligence claims against defendant hospital under N.C.G.S. § 1A-1, Rule 12(b)(5) based on improper service. Plaintiff used a private process service and there was no evidence that the sheriff was unable to fulfill the duties of a process server as required by statute.

Judge BERGER concurring in part and dissenting in part.

Appeal by Plaintiff from orders entered 2 February 2016 and 4 February 2016 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 8 March 2017.

Law Offices of Walter L. Hart, IV, by Walter L. Hart, IV, for Plaintiff-Appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch, David D. Ward, and Katherine Hilkey-Boyatt, for Defendant-Appellees Matthew S. Cummings, M.D., Duke University Health System, and Duke University Affiliated Physicians, Inc.

Brotherton Ford Berry & Weaver, PLLC, by Robert A. Ford and Demetrius Worley Berry, for Defendant-Appellee Southeastern Regional Medical Center.

HUNTER, JR., Robert N., Judge.

Marjorie C. Locklear ("Plaintiff") appeals from an order dismissing her complaint against Defendants Dr. Matthew Cummings, Duke University Health System, and Duke University Affiliated Physicians (collectively "Duke Defendants") under Rule 9(j), as well as the denial of her motion to amend under Rule 15(a). Plaintiff also appeals from an order dismissing her complaint against Defendant Southeastern Regional Medical Center ("Southeastern") under Rules 9(j) and 12(b)(5), as well as the denial of her motion to amend under Rule 15(a). After review, we reverse in part and affirm in part.

I. Factual and Procedural Background

On 30 July 2015, one day before the statute of limitations expired, Plaintiff filed a complaint against Defendants, seeking monetary damages for medical negligence. The complaint alleges the following narrative.

On 31 July 2012, Dr. Cummings performed cardiovascular surgery on Plaintiff. During surgery, Dr. Cummings failed to monitor and control Plaintiff's body and was distracted. Additionally, he did not position himself in close proximity to Plaintiff's body. While Plaintiff "was opened up and had surgical tools in her[,]" Plaintiff fell off of the surgical table. Plaintiff's head and the front of her body hit the floor. As a result of the fall, Plaintiff suffered a concussion, developed double vision, injured her jaw, displayed bruises, and was "battered" down the left side of her body. Plaintiff also had "repeated" nightmares about falling off the surgical table. Duke Defendants and Defendant Southeastern acted negligently by retaining physicians, nurses, and other healthcare providers who allowed Plaintiff's accident to occur.

On 9 September 2015, private process server, Richard Layton, served Duke Defendants by delivering Plaintiff's civil cover sheet, summons, and complaint to Margaret Hoover, a registered agent for Duke Defendants. On 19 September 2015, Gary Smith, Jr. served Plaintiff's summons and complaint on Dr. Cummings. Lastly, on 24 September 2015, Smith served Plaintiff's summons and complaint on Southeastern by delivering the papers to C. Thomas Johnson, IV, Southeastern's Chief Financial Officer.[1]

1. In Smith's affidavit, he listed Johnson as Southeastern's registered agent.

On 10 November 2015, Dr. Cummings and Duke Defendants filed a joint answer and motion to dismiss. Dr. Cummings and Duke Defendants denied the allegations in Plaintiff's complaint and asserted defenses under Rules 12(b)(6) and 9(j) of the North Carolina Rules of Civil Procedure.

On 23 November 2015, Southeastern filed an answer and denied Plaintiff's allegations. Southeastern moved to dismiss Plaintiff's compliant under Rules 12(b)(4), 12(b)(5), 12(b)(6), and 9(j) of the North Carolina Rules of Civil Procedure. On 29 December 2015, Johnson filed an affidavit. In the affidavit, Johnson swore he was the Chief Financial Officer of Southeastern, but not the corporation's registered agent.

On 11 January 2016, the trial court held a hearing on all the Defendants' pending motions. During argument, Plaintiff requested "leave of the Court to amend [the] complaint so that there's no controversy hereafter." Plaintiff moved under Rule 60, not Rule 15(a), because "Rule 60 . . . allows a mere clerical order – error to be corrected." Then, Plaintiff requested leave "pursuant to Rules 15(a) and 60."

On 2 February 2016, the trial court granted Dr. Cummings's and Duke Defendants' motion to dismiss pursuant to Rule 9(j) and denied Plaintiff's motion to amend under Rule 15(a). On 4 February 2016, the trial court granted Southeastern's motion to dismiss pursuant to Rules 9(j) and 12(b)(5) and denied Plaintiff's motion to amend under Rule 15(a). Plaintiff filed timely notice of appeal.

II. Standard of Review

The standard of review of a Rule 12(b)(6) motion to dismiss is *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). Likewise, a trial court's order dismissing a complaint pursuant to Rule 9(j) is reviewed *de novo* on appeal because it is a question of law. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 256, 677 S.E.2d 465, 477 (2009) (citation omitted).

We review the trial court's dismissal under Rule 12(b)(5) *de novo*. *New Hanover Cty. Child Support Enforcement ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012) (citation omitted).

III. Analysis

A. Motions to Dismiss under Rule 12(b)(6) and Rule 9(j)

[1] Plaintiff argues the trial court erred in dismissing her complaint against all the Defendants under Rule 12(b)(6) and Rule 9(j). Because

Plaintiff's claims sound in ordinary negligence, not medical malpractice, we agree.

"In North Carolina, the distinction between a claim of medical malpractice and ordinary negligence is significant for several reasons, including that medical malpractice actions cannot be brought [without Rule 9(j) compliance]." *Gause v. New Hanover Reg'l Med. Ctr.*, ___ N.C. App. ___, ___, 795 S.E.2d 411, ___ (2016) (citing N.C. Gen. Stat. § 1A-1, Rule 9(j) (2015)).

"Whether an action is treated as a medical malpractice action or as a common law negligence action is determined by our statutes[.]" *Smith v. Serro*, 185 N.C. App. 524, 529, 648 S.E.2d 566, 569 (2007). N.C. Gen. Stat. § 90-21.11(2)(a) defines a medical malpractice action as "[a] civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of . . . health care by a health care provider." N.C. Gen. Stat. § 90-21.11(2)(a). "The term 'professional services' is not defined by our statutes but has been defined by the Court as 'an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.' " *Gause*, ___ N.C. App. at ___, 795 S.E.2d at ___ (quoting *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 628, 652 S.E.2d 302, 305 (2007)). "Our courts have classified as medical malpractice those claims alleging injury resulting from activity that required clinical judgment and intellectual skill." *Id.* at ___, 795 S.E.2d at ___ (citation omitted). "Our courts have classified as ordinary negligence those claims alleging injury caused by acts and omissions in a medical setting that were primarily manual or physical and which did not involve a medical assessment or clinical judgment." *Id.* at ___, 795 S.E.2d at ___ (citation omitted).

In cases of a plaintiff falling, the deciding factor is whether the decisions leading up to the fall required clinical judgment and intellectual skill. Where the complaint alleges or discovery shows the fall occurred because medical personnel failed to properly use restraints, the claim sounded in medical malpractice. *Sturgill*, 186 N.C. App. at 628-30; *Alston v. Granville Health Sys.*, 221 N.C. 416, 421, 727 S.E.2d 877, 881 (2012) ("*Alston II*"). However, when a complaint alleged the plaintiff fell of a gurney in an operating room while unconscious, this Court held the claim sounded in ordinary negligence, not medical malpractice. *Alston v. Granville Health Sys.*, No. 09-1540, 2010 WL 3633738 (unpublished)

(Sept. 21, 2010) ("*Alston I*").[2] The question is whether the actions leading to the fall require specialized skill or clinical judgment. *Gause*, ___ N.C. App. at ___, 795 S.E.2d at ___ (citations omitted).

In her complaint, Plaintiff states, *inter alia*:

> 23. That, at all times relevant to this action, Defendant Cummings . . . held himself out to possess the special skills and knowledge possessed by other physicians practicing in the specialized field of internal medicine, cardiology, and cardiovascular surgery.
>
> 24. That the medical care and treatment rendered to Plaintiff by Defendant Cummings on July 31, 2012 has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care.
>
> 25. That the medical care and treatment of Defendant Cummings has been reviewed by a person that Plaintiff will seek to have qualified by an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care.
>
> ...
>
> 27. That the times, places, and on the occasion herein in question, Defendant Cummings was negligent, and his acts and omissions of negligence include, but are not limited to:
>
> > a) In failing to use his best professional judgment and skill while operating on the Plaintiff;

2. In *Alston I*, this Court reversed the trial court's dismissal of plaintiff's complaint and held Rule 9(j) certification was not required, because plaintiff's claims sounded in ordinary negligence. Following discovery and a motion for summary judgment, the trial court granted summary judgment for defendants and dismissed the plaintiff's action again. This Court upheld the subsequent dismissal, as discovery showed "the decision to restrain a patient under anesthesia is one that requires use of specialized skill and knowledge and, therefore, is considered a professional service." *Alston II*, 221 N.C. App. at 421, 727 S.E.2d at 881.

b) In failing to properly control Plaintiff's body during the surgery;

c) In failing to properly monitor Plaintiff's body during surgery;

d) In allowing himself to be distracted;

e) In not positioning himself in close proximity to Plaintiff's body;

f) In not properly supervising and directing the proximity of nurses and other staff in relation to Plaintiff;

g) In allowing Plaintiff to fall off the operating table;

h) In failing to use good judgment, reasonable skill, and diligence in the treatment of Plaintiff; and

i) Defendant Cummings was otherwise careless and negligent.

Plaintiff's complaint sounds in ordinary negligence, not medical malpractice. Although Plaintiff uses language which would seemingly trigger a medical malpractice claim, we conclude the *facts* in Plaintiff's complaint give rise to a claim of ordinary negligence. Plaintiff's factual allegation, namely "Plaintiff was allowed to fall off the operating table while Plaintiff was opened up and had surgical tools in her[,]" forecasts the type of injury resulting from actions not requiring specialized skill or clinical judgment. *Gause*, ___ N.C. App. at ___, 795 S.E.2d at ___ (citations omitted).

Dr. Cummings and Duke Defendants contend Plaintiff failed to argue her action is not medical malpractice, and, thus, Plaintiff is barred from raising this issue on appeal. Defendants further contend we cannot address this issue on appeal, as it would constitute this Court improperly supplementing an appellant's brief. However, in our *de novo* review, we cannot review whether the trial court erred in dismissing Plaintiff's complaint under Rule 9(j) without addressing whether Rule 9(j) certification is required.

Notwithstanding Defendants' arguments, we hold this action sounds in ordinary negligence. Therefore, Plaintiff was not required to comply with Rule 9(j). Accordingly, the trial court erred in dismissing Plaintiff's complaint under Rules 12(b)(6) and 9(j).[3]

3. Because we reverse the trial court's order on Rule 12(b)(6) and Rule 9(j) grounds, we need not address whether the trial court erred in denying Plaintiff's motion to amend her complaint under Rule 15 of the North Carolina Rules of Civil Procedure.

The concurring and dissenting opinion asserts our majority supplements Plaintiff's arguments on appeal and improperly concludes Plaintiff's claims sound in ordinary negligence. In support of this contention, the concurring and dissenting opinion cites to the legislative intent of Rule 9(j).

At the outset, as stated above, our majority does not improperly supplement Plaintiff's appeal because, in our *de novo* review, we must decide whether Rule 9(j) certification is required before we can affirm a trial court's dismissal of a complaint for lack of Rule 9(j) compliance.

Next, we note a court's "consideration of a motion brought under Rule 12(b)(6) is limited to examining the legal sufficiency of the allegations contained within the four corners of the complaint." *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 32-33, 738 S.E.2d 819, 822 (2013) (citation omitted). *See also Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, ___ N.C. App. ___, ___, 796 S.E.2d 120, ___ (2017) (citation omitted). Additionally, "[d]ismissal of an action under Rule 12(b)(6) is appropriate when the complaint 'fail[s] to state a claim upon which relief can be granted.' " *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, ___, 781 S.E.2d 1, 7 (2015) (quoting N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013)) (second alteration in original). "When the complaint on its face reveals that no law supports the claim [or] reveals an absence of facts sufficient to make a valid claim . . . dismissal is proper." *Id.* at ___, 781 S.E.2d at 8 (citation omitted) (emphasis added). Accordingly, there is no need to delve into the legislative intent behind Rule 9(j). Instead, we look at the four corners of Plaintiff's complaint and acknowledge that Plaintiff revealed facts sufficient to make a valid claim, a claim of ordinary negligence, under our case law. *See id.* at ___, 781 S.E.2d at 8 (citation omitted).

B. Motion to Dismiss under Rule 12(b)(5)

[2] Plaintiff next contends the trial court erred in dismissing her claims against Southeastern under Rule 12(b)(5). We disagree.

Rule 4 of the North Carolina Rules of Civil Procedure governs service of process in North Carolina. Rule 4 states, *inter alia*:

> (a) Summons — Issuance; who may serve.–Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons.

. . .

> (h) Summons—When proper officer not available.—If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.
>
> (h1) Summons—When process returned unexecuted. – If a proper officer returns a summons or other process unexecuted, the plaintiff or his agent or attorney may cause service to be made by anyone who is not less than 21 years of age, who is not a party to the action, and who is not related by blood or marriage to a party to the action or to a person upon whom service is to be made. This subsection shall not apply to executions pursuant to Article 28 of Chapter 1 or summary ejectment pursuant to Article 3 of Chapter 42 of the General Statutes.

N.C. Gen. Stat. § 1A-1, Rule 4 (2016).

Plaintiff argues service by a private process server is permissible under the North Carolina Rules of Civil Procedure if the private process server files an affidavit under N.C. Gen. Stat. § 1-75.10.[4]

Southeastern contends holding Plaintiff's service was proper conflates Rule 4(a) with Rule 4(h) and Rule 4(h1). We agree.

Here, Plaintiff hired a private process server, Smith, to serve Southeastern. On 24 September 2015, Smith served Johnson, the Chief Financial Officer of Southeastern. On 14 October 2015, Smith signed an "Affidavit of Process Server" asserting he was over the age of 18 years, not a party to the action, and "authorized by law to perform said service."

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4. In support of her argument, Plaintiff also cites *Garrett v. Burris*, No. COA14-1257, 2015 WL 4081832 (unpublished) (N.C. Ct. App. July 7, 2015). However, *Garrett* is an unpublished opinion and is not binding authority.

In North Carolina, private process service is not always "authorized under law". The proper person for service in North Carolina is the sheriff of the county where service is to be attempted or some other person duly authorized by law to serve summons. N.C. Gen. Stat. § 1A-1, Rule 4(a). Although Plaintiff's process server filed the statutorily required affidavit, a self-serving affidavit alone does not confer "duly authorized by law" status on the affiant. Legal ability to serve process by private process server is limited by statute in North Carolina to scenarios where the sheriff is unable to fulfill the duties of a process server. N.C. Gen. Stat. § 1A-1, Rule 4(h), (h1). For example, if the office of the sheriff is vacant, the county's coroner may execute service. N.C. Gen. Stat. § 162-5. Additionally, if service is unexecuted by the sheriff under Rule 4(a), the clerk of the issuing court can appoint "some suitable person" to execute service under Rule 4(h). Here, the record does not disclose the sheriff was unable to deliver service so that the services of a process server would be needed. This is commonly accepted statutory practice in North Carolina and discussed in treatises dealing with civil procedure. *See* William A. Shuford, *North Carolina Civil Practice and Procedure* § 4.2 (6th ed.); 1 G. Gray Wilson, *North Carolina Civil Procedure* § 4-4, at 4-16 (2016). Accordingly, we affirm the trial court's order dismissing Plaintiff's claims against Southeastern under Rule 12(b)(5) of the North Carolina Rules of Civil Procedure.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order dismissing Plaintiff's complaint against Dr. Cummings and Duke Defendants. We affirm the trial court's order dismissing Plaintiff's complaint against Southeastern.

REVERSED IN PART; AFFIRMED IN PART.

Judge CALABRIA concurs.

Judge BERGER concurring in part and dissenting in part.

BERGER, Judge, concurring in part and dissenting in part.

Plaintiff failed to comply with Rule 4 of the North Carolina Rules of Civil Procedure when she failed to serve her summons and complaint on Defendant Southeastern Regional Medical Center ("Southeastern") through a person authorized by law. Therefore, I concur with the majority that the trial court did not err when it granted Southeastern's

motion to dismiss pursuant to Rule 12(b)(5) for insufficiency of service of process.

However, Plaintiff pleaded a claim of medical malpractice by a healthcare provider in her complaint, not a claim of ordinary negligence as asserted by the majority. Because this was a medical malpractice claim, Plaintiff did not comply with pleading requirements when she failed to allege that "all medical records pertaining to the alleged negligence . . . have been reviewed" as required by Rule 9(j). Because the amendment of a complaint for medical malpractice to correct a deficient Rule 9(j) certification is improper and does not relate back to the date of filing the complaint, the trial court did not err in denying Plaintiff's motion to amend which was filed after the statute of limitations had expired. In dismissing Plaintiff's complaint, the trial court did not err, as stated in the majority's opinion, and I must respectfully dissent.

On July 30, 2015, Plaintiff filed a complaint for damages and punitive damages in Robeson County Superior Court alleging medical malpractice by Defendants in that:

(a) Defendant Cummings ("Dr. Cummings"), is a physician practicing in the fields of internal medicine, cardiology, and cardiovascular surgery, and he treated Plaintiff and had a responsibility to treat Plaintiff;

(b) Dr. Cummings "held himself out to possess the special skills and knowledge possessed by other physicians practicing in the specialized field of internal medicine, cardiology, and cardiovascular surgery[;] and held himself out to possess the special skills and knowledge possessed by other physicians practicing in the specialized field of internal medicine, cardiology, and cardiovascular surgery in his locality or other similar localities with the same training and experience."

(c) On July 31, 2012, Dr. Cummings, with the assistance of nurses and staff of Southeastern Regional Medical Center ("Southeastern"), performed cardiovascular surgery on Plaintiff, and during the surgery, Plaintiff suffered injuries when she "was allowed to fall off the operating room table while Plaintiff was opened up and had surgical tools in her."

(d) "[T]he medical care rendered to Plaintiff fell below the applicable standard of care."

(e) Defendants were negligent in failing to comply with the standard of care set forth in Article 1B of the North Carolina

General Statutes, entitled "Medical Malpractice Actions", Section 90-21.12, "Standard of health care";

(f) Dr. Cummings failed to use his "best professional judgment and skill while operating on the Plaintiff"; failed "to properly control Plaintiff's body during the surgery"; failed "to properly monitor Plaintiff's body during surgery"; was distracted; was not properly positioned during surgery; did not properly supervise or direct nurses and staff regarding proper positioning; and failed "to use good judgment, reasonable skill, and diligence in the treatment of Plaintiff[.]"

(g) The remaining Defendants were directly and vicariously liable for negligent employment and/or retention of health care professionals and their actions in this matter.

(h) Plaintiff further alleged that the professional medical care and treatment provided by Defendants was reviewed by an individual "reasonably expected to qualify" and that "Plaintiff will seek to have qualified by an expert witness . . . , and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care."

Plaintiff's complaint was a malpractice action, defined as either:

a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.

b. A civil action against a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

N.C. Gen. Stat. § 90-21.11(2)(a) and (b) (2015).

Plaintiff, throughout her complaint, asserted that Dr. Cummings, Southeastern, Duke University Health System, and Duke University Affiliated Physicians, Inc. had provided professional medical services

to Plaintiff. She further alleged that Dr. Cummings, while "acting in the course and scope of his employment," utilized his professional skill and judgment in operating on Plaintiff, and in doing so, failed to position himself to properly control and monitor Plaintiff's body. Plaintiff further asserted that Dr. Cummings failed to properly supervise other health care professionals during the operation.

Plaintiff's complaint alleges that each Defendant violated the standard of care set forth in N.C. Gen. Stat. § 90-21.12. Subparagraph (a) of that statute reads as follows:

> Except as provided in subsection (b) of this section, in any *medical malpractice* action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action; or in the case of a *medical malpractice* action as defined in G.S. 90-21.11(2)(b), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the action or inaction of such health care provider was not in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12(a) (emphasis added).

Plaintiff's brief acknowledges that her complaint was one for medical malpractice. In her Statement of the Case, Plaintiff states, "Marjorie Locklear ("Plaintiff" or "Locklear") commenced this *medical malpractice action* on 30 July 2015." (emphasis added). Plaintiff's brief also focuses on Rule 9(j) certification, which is only applicable to medical malpractice claims.

Plaintiff does not argue that this is an action for ordinary negligence as the majority has found; thus, this argument should be deemed abandoned. " 'It is not the duty of this Court to supplement an appellant's

brief with legal authority or arguments not contained therein. These arguments are deemed abandoned by virtue of [Rule 28(b)(6) of the North Carolina Appellate Procedures].' " *Sanchez v. Cobblestone Homeowners Ass'n of Clayton, Inc.*, ___ N.C. App. ___, ___, 791 S.E.2d 238, 245 (2016) (citation and brackets omitted).

The majority cites to the unpublished opinion *Alston*, wherein this Court held the decedent's injuries from falling off a gurney in an operating room sounded in ordinary negligence and not medical malpractice. *Alston v. Granville Health Sys.*, 207 N.C. App. 264, 699 S.E.2d 478 (2010), *aff'd*, 221 N.C. App. 416, 727 S.E.2d 877 (2012) (unpublished). This Court held the "[p]laintiff's sole cause of action [wa]s for ordinary negligence under a theory of *res ipsa loquitur*," and did not require compliance with Rule 9(j). *Id.* Further, "[b]ecause [p]laintiff herein elected to proceed solely on a *res ipsa loquitur* theory, [p]laintiff is bound by that theory." *Id.*

The transfer of a patient from the operating table to a gurney before or after surgery, as in *Alston*, is "primarily manual or physical and … d[oes] not involve a medical assessment or clinical judgment." *Gause v. New Hanover Regional Medical Center*, ___ N.C. App. ___, ___, 795 S.E.2d 411, 415 (2016).

Conversely, in the case *sub judice*, Plaintiff alleged her injuries occurred from falling off of the operating table *during* the surgery. The positioning and controlling of Plaintiff's body while on the operating table, during active surgery, while Plaintiff's opened body contained surgical tools, required "clinical judgment and intellectual skill." *Id.* Thus, because Plaintiff's factual allegations sound in medical malpractice, and her complaint specifically alleges medical malpractice, Plaintiff is required to comply with Rule 9(j).

Further, converting Plaintiff's action into one for ordinary negligence would allow her to circumvent the requirement of expert certification for her medical malpractice complaint. The majority's finding that this is an action for ordinary negligence creates a loophole for Plaintiff after she improperly filed her medical malpractice claim. Plaintiff's witnesses for an ordinary negligence claim will still be testifying as to the proper positioning and monitoring of a body during cardiovascular surgery, and the witnesses who will be qualified to testify are the same doctors and nurses who would testify to the proper procedures during a cardiovascular surgery under a medical malpractice lawsuit. The majority's conversion of Plaintiff's medical malpractice action into an ordinary negligence action defeats the legislative intent of Rule 9(j).

Turning to Plaintiff's arguments under Rule 9(j), they fail. In pertinent part, Rule 9(j) states that:

> Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 *shall be dismissed* unless:
>
> (1) *The pleading specifically asserts* that the medical care *and all medical records* pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry *have been reviewed* by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The *pleading specifically asserts* that the medical care *and all medical records* pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry *have been reviewed* by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> . . .
>
> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court . . . may allow a motion to extend the statute of limitations for a period not to exceed 120 days *to file a complaint* in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2015).

Thus, dismissal of a medical malpractice action is required unless the pleading requirements of Rule 9(j) are satisfied. Our Supreme Court held that:

> Rule 9(j) clearly provides that "*any* complaint alleging medical malpractice . . . *shall* be dismissed" if it does not

> comply with the certification mandate . . . [W]e find the inclusion of "shall be dismissed" in Rule 9(j) to be more than simply "a choice of grammatical construction." While other subsections of Rule 9 contain requirements for pleading special matters, no other subsection contains the mandatory language "shall be dismissed." This indicates that medical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification necessarily leads to dismissal.

Thigpen v. Ngo, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (emphasis in original) (internal citations and brackets omitted). Here, Plaintiff provided proper certification regarding *medical care and treatment*, but failed to comply with Rule 9(j) as there was no allegation concerning review of medical records.

On January 11, 2016, Plaintiff in open court moved to amend the complaint pursuant to Rule 15(a) to comply with Rule 9(j). The trial court correctly denied this motion as it was made nearly six months after the statute of limitations had expired.

This Court previously held that "Rule 9(j) must be satisfied at the time of the complaint's filing." *Alston v. Hueske*, ___ N.C. App. ___, ___, 781 S.E.2d 305, 309 (2016). In *Hueske*, as here, the plaintiff sought to amend her complaint to comply with the certification requirements of Rule 9(j). This Court noted that

> [b]ecause the legislature has required strict compliance with this rule, our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to amend his complaint under Rule 15(a). To read Rule 15 in this manner would defeat the objective of Rule 9(j) which . . . seeks to avoid the *filing* of frivolous medical malpractice claims.

Id., at ___, 781 S.E.2d at 310 (emphasis in original) (internal citations and quotation marks omitted).

> The title of Rule 9, 'Pleading special matters,' plainly signals the statute's tailoring to address distinct situations set out in the statute. [R]elation back is not available through Rule 15(c) of the North Carolina Rules of Civil Procedure

> to comply with Rule 9(j) . . . . Rule 9(j) mandates that any complaint which fails to comply with the certification requirement, "*shall be dismissed.*" . . . [A] trial judge can dismiss with prejudice where a complaint does not contain the certification required by Rule 9(j) and the statute of limitations has expired.

Bass v. Durham Cty. Hosp. Corp., 158 N.C. App. 217, 225, 580 S.E.2d 738, 743 (2003) (Tyson, J., dissenting) (internal citations and quotation marks omitted) (emphasis in original), *rev'd for the reasons stated in the dissenting opinion*, 358 N.C. 144, 592 S.E.2d 687 (2004). *See also Thigpen v. Ngo*, 355 N.C. 198, 205, 558 S.E.2d 162, 167 (2002) ("[W]e hold that once a party receives and exhausts the 120-day extension of time in order to comply with Rule 9(j)'s expert certification requirement, the party cannot amend a medical malpractice complaint to include expert certification."); *Fintchre v. Duke University*, ___ N.C. App. ___, ___, 773 S.E.2d 318, 325 (2015) ("[W]here plaintiff failed to file a complaint including a valid Rule 9(j) certification within the statute of limitations, granting plaintiff's motion to amend . . . would have been futile . . . .").

Such is the case here. Plaintiff alleged that her care and treatment occurred July 31, 2012, and she filed her action July 30, 2015, one day before the statute of limitations would expire. Plaintiff's medical malpractice complaint failed to include a required Rule 9(j) certification regarding review of medical records.

Plaintiff failed to seek amendment of her complaint until January 11, 2016, nearly six months after the statute of limitations had expired, and 44 days beyond "[t]he 120-day extension of the statute of limitations available to medical malpractice plaintiffs by Rule 9(j) . . . for the purpose of complying with Rule 9(j)." *Bass* at 225, 580 S.E.2d at 743 (citing N.C. Gen. Stat. § 1A-1, Rule 9(j) (2001)). Allowing an amendment would have been futile, so it cannot be said that the trial court abused its discretion in denying that motion. Plaintiff failed to plead proper Rule 9(j) certification in her complaint before the statute of limitations expiration. If any complaint alleging medical malpractice shall be dismissed for failure to comply with the certification mandate of Rule 9(j), it cannot be said that the trial court erred in granting Defendants' motion to dismiss.

McKINNEY v. McKINNEY

[253 N.C. App. 473 (2017)]

GINGER A. McKINNEY, NOW GINGER L. SUTPHIN, PLAINTIFF
v.
JOSEPH A. McKINNEY, JR., DEFENDANT

No. COA16-884

Filed 16 May 2017

1. Appeal and Error—appealability—criminal contempt—appeal from district court to superior court

Defendant father's appeal of the portion of an order finding him in criminal contempt for failure to communicate with plaintiff mother regarding the whereabouts of the parties' minor son was not properly before the Court of Appeals. Criminal contempt orders are properly appealed from district court to the superior court.

2. Contempt—civil contempt—order vacated—compliance prior to entry of order

Defendant father's appeal of the portion of an order finding him in civil contempt for failure to return the parties' minor son back to the mother (after the child ran away from the mother's house to the father's house) was dismissed where the father returned the minor son to the mother prior to the effective date of the order.

3. Attorney fees—criminal contempt—civil contempt—sufficiency of findings

Defendant father's appeal of attorney fees incurred in relation to a criminal contempt finding was dismissed since the appeal of that portion of the order was not properly before the Court of Appeals. The portion related to the civil contempt finding was vacated where the district court made no finding that the father refused to allow the parties' minor child to live with plaintiff mother or refused to obey the custody orders.

Appeal by Defendant from orders entered 25 September 2014 and 22 March 2016 by Judge Teresa H. Vincent in Guilford County District Court. Heard in the Court of Appeals 8 February 2017.

Wyatt Early Harris Wheeler, LLP, by A. Doyle Early, Jr., and Arlene M. Zipp, for the Plaintiff-Appellee.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for the Defendant-Appellant.

DILLON, Judge.

Joseph A. McKinney, Jr., ("Father") appeals from two orders of the district court entered during the course of a dispute between Father and Ginger A. McKinney (Sutphin) ("Mother") regarding the custody of their adolescent son, Max.[1] Specifically, Father appeals (1) the district court's September 2015 order finding him in civil and criminal contempt (the "Contempt Order"), and (2) the district court's March 2016 order (the "Fee Award Order") denying his motion for relief from judgment or new trial and awarding attorney's fees to Mother.

I. Background

Mother and Father separated in 2002 when Max was two years old. For a period of time, the parties shared custody of Max. In 2009, when Max was ten years old, the parties entered into a consent order (the "2009 Custody Order") which awarded primary physical custody of Max to Mother and provided a specific schedule for Father's visitation.

In early 2014, Max expressed a strong desire to move from Greensboro, where he resided with Mother, to live with Father in Wilmington. In May 2014, Father filed a motion to modify custody with the district court.

In June 2014, before Father's motion to modify custody was heard, Max left Greensboro on his own and traveled to Wilmington to stay with Father. In July 2014, the parties entered into a consent order (the "2014 Consent Order") providing that Max would return to Greensboro.

However, in August 2014, Max again traveled on his own to Wilmington, staying for approximately one month with Father and attending high school in Wilmington. Mother then filed the second show cause motion based on Father's failure to return Max to Greensboro.

A hearing was held during the week of 8 September 2014 during which the district court orally rendered its decision, finding Father in criminal and civil contempt for failure to comply with the 2009 Custody Order and the 2014 Consent Order.

On 13 September 2014, Max returned to live with Mother in Greensboro.

On 25 September 2014, the district court entered a written order (the "Contempt Order"), reducing its prior oral decision finding Father in civil and criminal contempt to writing.

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1. A pseudonym.

In December 2014, the district court entered an order on Father's custody modification motion, awarding Father primary physical custody of Max.

On 22 March 2016, the district court entered the Fee Award Order awarding Mother approximately $51,100 for attorney's fees she incurred in prosecuting her contempt motion.

II. Analysis

Father appeals the Contempt Order finding him in civil and criminal contempt and the Fee Award Order awarding Mother $51,100.

Regarding the Contempt Order, we dismiss the appeal with respect to the portion finding Father in *criminal* contempt because that appeal must first be taken to superior court. Further, we vacate the Contempt Order to the extent that the district court found Father in civil contempt based on the fact that Father had already returned Max prior to the entry of the Order, thus satisfying the "purge" language.

Regarding the Fee Award Order, we dismiss the appeal to the extent the award is based on the criminal contempt finding. We reverse and remand to the extent the award is based on the civil contempt finding. We address our holdings in greater detail below.

A. Contempt Order

1. Criminal Contempt

[1] In its Contempt Order, the district court found Father in criminal contempt for "failure to communicate with [] Mother" in August 2014 when Max ran away to Wilmington for the second time. The district court sentenced Father to thirty (30) days in jail, but suspended the sentence for twelve (12) months based on certain conditions.[2]

In support of its order of criminal contempt, the district court essentially found that (1) Max ran away to Wilmington on 13 August 2014 after Max had a disagreement with Mother; (2) Mother sent text messages to

2. We note that the district court provided as one of the conditions of the suspended sentence that "the remaining balance of the sentence can be purged upon the return of custody to the Plaintiff Mother at any time prior to the time the full 30-day sentence has been served." This condition is the type that would be more appropriate for a finding of *civil* contempt. However, we conclude that the district court's finding of contempt was criminal in nature based on other conditions that the district court imposed. The district court imposed the sentence as a means to *punish* Father for what it determined to be a violation of the 2009 Custody Order that occurred from August 13-17, when Father failed to communicate with Mother.

Father regarding Max's welfare; (3) Father did not respond to Mother's inquiries until 17 August 2014; (4) Father's failure to respond to Mother violated a provision in the 2009 Custody Order that "[t]he parties shall confer with each other on all important matters pertaining to the health, welfare, education, and upbringing of the minor child with a view to arriving at a harmonious policy calculated to promote the best interest of the minor child"; and (5) Father's violation was willful, deliberate, and stubborn.

Our Supreme Court held in a *per curiam* opinion adopting a dissent from our Court that a finding of criminal contempt by the district court should be appealed to superior court and *not* to the Court of Appeals. *Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002); *see also Hancock v. Hancock*, 122 N.C. App. 518, 522, 471 S.E.2d 415, 417 (1996) ("Criminal contempt orders are properly appealed from district court to the superior court, not to the Court of Appeals."). And our General Assembly has directed that an "appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing *de novo* before a superior court judge." N.C. Gen. Stat. § 5A-17 (2015). Accordingly, we conclude that Father's appeal of that portion of the Contempt Order finding him in criminal contempt is not properly before us.[3] Therefore, we dismiss this portion of Father's appeal.

2. Civil Contempt

[2] On 10 September 2014, the district court rendered its oral order finding Father in civil contempt for "failing to return the child pursuant to the [2009 Custody Order] and the [2014 Consent Order]." On 13 September, before the district court entered its written Contempt order, Max returned to live with Mother in Greensboro. On 25 September, the district court entered the written Contempt Order finding Father in civil contempt and stating that Father could "purge himself of contempt by having [Max] delivered to the Plaintiff Mother[.]"

Our Court has held that a district court "does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt of court." *Ruth v. Ruth*, 158 N.C. App. 123, 126, 579 S.E.2d 909, 912 (2003).

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3. It appears from the record that Father did, in fact, appeal the criminal contempt order to superior court on 15 September 2014. However, the record does *not* include any documentation of the outcome of that appeal and Father has not appealed from any order of the superior court.

Here, the district court's order became effective on 25 September when the district court reduced its order to writing and the order was filed with the clerk. *See* N.C. R. Civ. P., Rule 58 ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."); *see also Olson v. McMillian*, 144 N.C. App. 615, 619, 548 S.E.2d 571, 574 (2001) ("When a trial court's oral order is not reduced to writing, it is non-existent[.]" (internal marks omitted)). Because Father had already returned Max to Mother prior to 25 September, the district court lacked the authority to find Father in civil contempt for failing to return Max. Therefore, we vacate the Contempt Order to the extent the district court found Father in civil contempt.

B. Fee Award Order

[3] In March 2016, the district court ordered Father to pay Mother $51,100 for attorneys' fees incurred in connection with Mother's prosecution of the Contempt Order. To the extent that the Fee Award Order relates to the finding of criminal contempt, we dismiss the appeal. The appeal of the criminal contempt order and related issues lies with the superior court as part of that court's review of the criminal contempt finding.

We conclude, though, that Father's appeal of the portion of the Fee Award Order relating to the civil contempt finding is properly before us. We note that we have vacated the district court's finding that Father was in civil contempt based on the fact that he purged himself of contempt prior to the Contempt Order being entered. However, our Court has held that the moving party may still recover attorneys' fees even if the other party has purged himself prior to the entry of an order finding him in civil contempt:

> As a general rule, attorney's fees in a civil contempt action are not available unless the moving party prevails. Nonetheless, in the limited situation where contempt fails because the alleged contemnor complies with the previous orders after the motion to show cause is issued and prior to the contempt hearing, an award of attorney's fees is proper.

Ruth, 158 N.C. App. at 127, 579 S.E.2d at 912.

Here, the district court found Father in civil contempt for his failure to comply with the 2009 Custody Order and the 2014 Consent Order based on Max running away to live with Father for approximately a month in August 2014. The district court's findings suggest, in part, that

Max ran away from Mother on his own and arrived at Father's house in Wilmington on 14 August; Father lives a wealthy lifestyle and Max likes the way he lives when he is with him. The district court further found that Father never told Max to run away from Mother; and Father "enticed" Max to stay with him because of Father's lifestyle. We hold that several of the findings made by the district court in support of its civil contempt order are erroneous.

For instance, the district court found that "[t]here was *no evidence* presented that the Defendant Father instructed [Max] that he had to abide by the [custody orders]." However, Father stated several times during his testimony that he told Max that Max needed to go back home to Mother. The district court also found that "[t]here was *no evidence* presented that the Defendant Father secured transportation after August 13, 2014, and told the child to get in the car or plane." But Father did state that he was willing to provide transportation but that Max was simply not willing to go. It was certainly within the district court's discretion to find that Father's testimony was not credible, but the district court did not state that "there was no *credible* evidence . . . ." Therefore, these findings are not supported by the evidence.

Further, much of the district court's reasoning in finding Father in civil contempt runs contra to our decision in *Hancock v. Hancock*, 122 N.C. App. 518, 417 S.E.2d 415 (1996). In *Hancock*, we held that a parent was not in civil contempt of a custody order where the mother encouraged her ten-year old child to go on scheduled visits with the father, that she did not force the child to stay or discourage the child from going with the father, that the child refused to go, and that the mother otherwise did not use physical force or a threat of punishment to make the child go with the father. *Id.* at 525, 471 S.E.2d at 419. Based on these findings, we reversed an order finding the mother in civil contempt, stating as follows:

> We find no evidence that [the mother] willfully refused to allow the child to visit with the [father]. Nor do we agree with the trial court's finding that "[the mother's] inaction in not requiring the minor child to visit with [the father] amounts to contempt because there is no evidence [the mother] resisted [the father's]" visitation or otherwise refused to obey the visitation order. She simply did not physically force the child to go. Absent any evidence she encouraged [the child's] refusal to go or attempted in any

> way to prevent the visitation, her actions or inactions, even if improper, do not rise to the level of contempt.

Id. at 525-26, 471 S.E.2d at 420-21.

In the present case, the district court made no finding that Father refused to allow Max to live with Mother or refused to obey the custody orders. The district court did not find that Father encouraged Max to stay with him, but rather, found that he told Max that Max should go home. It is true that the district court found that Father did not punish Max or make life uncomfortable for Max while remaining in Wilmington. And these actions and inactions may have been improper, but otherwise do not rise to the level of contempt. *See id.* We do not think that the findings that Father provided a high standard of living for Max which was an "enticement" for Max to prefer living with Father is enough to rise to the level of willfulness, absent a finding supported by the evidence that Father provided a high standard of living *for the purpose* of enticing Max to run away from Mother rather than merely for the purpose of providing for or bonding with Max.

Accordingly, we reverse the district court's order awarding attorney's fees incurred in relation to the civil contempt finding. On remand, the district court is free to consider evidence and enter findings regarding whether Father acted willfully in refusing to allow Max to visit with Mother.

III. Conclusion

We dismiss the appeal from the finding of criminal contempt and dismiss the appeal from the portion of the Fee Award Order relating to the finding of criminal contempt. We vacate the finding of civil contempt and reverse the portion of the Fee Award Order relating to the finding of civil contempt. This matter is remanded for action consistent with this opinion.

DISMISSED IN PART, VACATED IN PART, AND REMANDED.

Judges ELMORE and ZACHARY concur.

ORREN v. ORREN

[253 N.C. App. 480 (2017)]

DANIEL R. ORREN, PLAINTIFF
v.
CAROLYN B. ORREN, DEFENDANT

No. COA16-1024

Filed 16 May 2017

Divorce—alimony—cohabitation defense

The trial court acted under a misapprehension of law when it denied plaintiff's request to assert a cohabitation defense, stating that "cohabitation isn't a defense to an alimony claim."

Appeal by plaintiff from order entered 18 April 2016 by Judge Christine Underwood in Alexander County District Court. Heard in the Court of Appeals 8 March 2017.

Homesley, Gaines, Dudley & Clodfelter, LLP, by Edmund L. Gaines and Leah Gaines Messick, for plaintiff-appellant.

Wesley E. Starnes for defendant-appellee.

DIETZ, Judge.

Plaintiff Daniel Orren appeals from the trial court's alimony order. He contends that the trial court erred by denying his request to assert a cohabitation defense at the alimony hearing. The trial court denied Mr. Orren's request in part because the court believed "cohabitation isn't a defense to an alimony claim."

As explained below, this Court has held that cohabitation is a defense to an alimony claim. *Williamson v. Williamson*, 142 N.C. App. 702, 704, 543 S.E.2d 897, 898 (2001). Thus, the trial court acted under a misapprehension of the law when it rejected Mr. Orren's request to assert a cohabitation defense. When a trial court acts under a misapprehension of the law, this Court must vacate the challenged order and remand for the trial court to examine the issue under the proper legal standard. *Stanback v. Stanback*, 270 N.C. 497, 507, 155 S.E.2d 221, 229 (1967). Accordingly, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

Facts and Procedural History

On 17 August 2009, Daniel Orren filed for divorce from his wife, Carolyn Orren, and sought equitable distribution of the parties' property.

On 2 November 2009, Ms. Orren filed an answer and counterclaims for postseparation support, alimony, and equitable distribution.

In June 2012, following a hearing and a consent agreement, the trial court entered an equitable distribution order. In September 2012, the trial court held a hearing on Ms. Orren's request for alimony. At the end of the hearing, the court took the matter under advisement. Later that month, the court drafted an alimony order and mailed it to the Alexander County Clerk of Superior Court for filing, but the clerk's office did not receive it.

Apparently, over the next three years, neither party informed the trial court that the alimony order had not been entered. Finally, in September 2015, Mr. Orren sought leave from the trial court to assert the defense of cohabitation in response to the pending alimony claim. The trial court then discovered that "the Clerk did not receive the Order prepared by the Court." The trial court explained that "[u]pon learning that the Order had not been filed with the Clerk, the Court sought to retrieve the Order but found it impossible to do so due to an earlier malfunction in the home computer." The trial court therefore "elected to reopen the evidence regarding changes in the parties' circumstances which have occurred [since] September 21, 2012." The court held a hearing on 30 September 2015 to take additional evidence with respect to the alimony claim, but rejected Mr. Orren's request to assert the defense of cohabitation.

On 18 April 2016, the trial court entered an alimony order that awarded Ms. Orren alimony, attorneys' fees, and a "distributive award" from a retirement incentive package that Mr. Orren received after entry of the equitable distribution order but before entry of the alimony order. Mr. Orren timely appealed.

Analysis

Mr. Orren first argues that the trial court abused its discretion by rejecting his request to assert cohabitation as a defense to his ex-wife's alimony claim. As explained below, because the trial court acted under a misapprehension of the law, we vacate the trial court's order and remand for further proceedings.

Among other reasons why the trial court rejected Mr. Orren's request to assert a cohabitation defense, the trial court stated that Mr. Orren's request was futile because "cohabitation isn't a defense to an alimony claim." This statement is wrong. In *Williamson v. Williamson*, the trial court permitted evidence of cohabitation at an initial alimony hearing

and then ruled that "plaintiff was not obligated for alimony or postseparation support payments from the time defendant's cohabitation began." 142 N.C. App. 702, 703, 543 S.E.2d 897, 897 (2001). On appeal, the defendant argued that a court may only modify an *existing* alimony award based on cohabitation and cannot consider cohabitation as a defense to an *initial* alimony award. This Court squarely rejected that argument, holding that cohabitation is a defense to an initial award of alimony:

> Defendant argues that this statute refers to a modification of alimony. Defendant asserts "cohabitation" is not a defense in an initial action for alimony. We disagree.

Id. at 704, 543 S.E.2d at 898.

To be sure, as Ms. Orren points out, the cohabitation statute provides that, "[i]f a dependent spouse *who is receiving* postseparation support or alimony from a supporting spouse . . . *engages* in cohabitation, the postseparation support or alimony shall terminate." N.C. Gen. Stat. § 50–16.9(b) (emphasis added). Thus, the statute addresses situations in which postseparation support or alimony already has been awarded before the cohabitation begins. But *Williamson* did not limit its holding in that way; it held more broadly that cohabitation is "a defense in an initial action for alimony." *Williamson*, 142 N.C. App. at 704, 543 S.E.2d at 898. Moreover, the alimony statute provides that, "[i]n determining the amount, duration, and manner of payment of alimony, the court shall consider *all relevant factors* . . . ." N.C. Gen. Stat. § 50– 16.3A(b) (emphasis added). The fact that an award of alimony would immediately be subject to termination based on cohabitation is a "relevant factor" the trial court can consider in its initial alimony award. Simply put, as the Court held in *Williamson*, cohabitation may be asserted as a defense to an initial alimony claim.

When a trial court acts under a misapprehension of the law in a discretionary ruling, this Court must vacate the trial court's ruling and remand for reconsideration under the correct legal standard. *Stanback v. Stanback*, 270 N.C. 497, 507, 155 S.E.2d 221, 229 (1967); *State v. Grundler*, 249 N.C. 399, 402, 106 S.E.2d 488, 490 (1959). Here, the trial court refused to permit Mr. Orren to assert a cohabitation defense at the alimony hearing in part because "cohabitation isn't a defense to an alimony claim." As explained above, that is incorrect; cohabitation *is* a defense to an alimony claim. Thus, we must vacate the trial court's alimony order and remand for further proceedings.

Mr. Orren also challenges the trial court's "distributive award" of $17,497.28 based on Mr. Orren's receipt of an early retirement incentive

package. Mr. Orren received the retirement award after entry of the equitable distribution order but before entry of the alimony order three years later. The trial court's alimony order states that "[b]ecause the benefits were accrued during the time the parties were married and owned on the date of separation, the Court elects to classify these benefits as marital property which was not distributed pursuant to the Equitable Distribution Order."

Because we vacate the trial court's order and, on remand, the cohabitation issue might bar some or all of the requested alimony, we decline to address this issue because it may be moot. But we observe that, although receipt of a retirement incentive might be a relevant factor to consider in setting the amount of alimony, *see* N.C. Gen. Stat. § 50–16.3A(b), an alimony order should not (and cannot) be used as a tool to amend an earlier equitable distribution order.

Conclusion

We vacate the trial court's alimony order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and TYSON concur.

PLASMAN v. DECCA FURNITURE (USA), INC.

[253 N.C. App. 484 (2017)]

CHRISTIAN G. PLASMAN, IN HIS INDIVIDUAL CAPACITY AND DERIVATIVELY FOR THE BENEFIT OF, ON BEHALF OF AND RIGHT OF NOMINAL PARTY BOLIER & COMPANY, LLC, PLAINTIFFS

v.

DECCA FURNITURE (USA), INC., DECCA CONTRACT FURNITURE, LLC, RICHARD HERBST, WAI THENG TIN, TSANG C. HUNG, DECCA FURNITURE, LTD., DECCA HOSPITALITY FURNISHINGS, LLC, DONGGUAN DECCA FURNITURE CO., LTD., DARREN HUDGINS, DECCA HOME, LLC, AND ELAN BY DECCA, LLC, DEFENDANTS, AND BOLIER & COMPANY, LLC, NOMINAL DEFENDANT

v.

CHRISTIAN J. PLASMAN A/K/A BARRETT PLASMAN, THIRD-PARTY DEFENDANT

No. COA16-777

Filed 16 May 2017

1. Contempt—civil contempt—jurisdiction—preliminary injunction—appeal from underlying interlocutory order—no substantial right

The North Carolina Business Court had jurisdiction to hold the owners of a closely held business in civil contempt based on their failure to comply with an order enforcing the terms of a preliminary injunction entered against them in federal court. The appeal of an underlying interlocutory order enforcing the injunction did not affect a substantial right and did not stay the contempt proceedings.

2. Appeal and Error—preservation of issues—failure to argue or present at trial

Certain issues in plaintiff business owners' brief were not properly argued or presented, and thus, were deemed abandoned. Certain other issues were preserved since they were specifically argued on appeal.

3. Appeal and Error—interlocutory orders and appeals—contempt order—substantial right

The owners of a closely held business's appeal from a contempt order was properly before the Court of Appeals. The appeal of any contempt order affects a substantial right and is immediately appealable.

4. Injunctions—irreparable harm—ripeness—federal court—impermissible collateral attack of underlying injunction

Whether the issuance of an injunction was necessary to avoid irreparable harm to a furniture manufacturer was an issue ripe for consideration in federal court. The owners of a closely held business who partnered with the furniture manufacturer could not mount an

impermissible collateral attack on the underlying injunction over three years after its entry.

5. Contempt—civil contempt—willful noncompliance

The judge's finding in a civil contempt case that the owners of a closely held business were in willful noncompliance with an order requiring them to return diverted funds and provide an accounting of those funds was supported by competent evidence. The record revealed instances in which the business owners acted with knowledge of and stubborn resistance to the order's clear directives.

6. Contempt—civil contempt—obligation to return diverted funds

Although the owners of a closely held business argued in a civil contempt case that an injunction and order requiring them to return diverted funds and provide an accounting of those funds to a partner furniture manufacturer were no longer enforceable because the furniture manufacturer refused to comply with the requirement that the business owners be provided with certain information, the business owners' obligation to return diverted funds remained in place.

7. Contempt—civil contempt—present ability to pay—jointly held bank accounts—individually held retirement accounts

The trial court did not err in a civil contempt case by considering the jointly held bank accounts and individually held investment retirement accounts of owners of a closely held business in assessing their present ability to comply with an order requiring them to return diverted funds and provide an accounting of those funds. The protections afforded real property held by spouses as tenants by the entirety did not apply.

Appeal by plaintiffs and third-party defendant from order entered 26 February 2016 by Judge Louis A. Bledsoe, III in Catawba County Superior Court. Heard in the Court of Appeals 21 February 2017.

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for plaintiffs-appellants and third-party defendant-appellant.

McGuireWoods LLP, by Robert A. Muckenfuss, Jodie H. Lawson, and Andrew D. Atkins, for defendants-appellees.

ZACHARY, Judge.

This appeal comes to the Court as the result of a bitter corporate dispute that has yet to reach the discovery phase nearly five years after the action was filed. Plaintiff Christian G. Plasman (Plasman) and third-party defendant Christian J. Plasman (Barrett) (collectively with Plasman, the Plasmans) appeal from an order of the North Carolina Business Court[1] holding them in civil contempt of court.

The contempt order was entered after the Plasmans failed to comply with a Business Court order enforcing the terms of a preliminary injunction entered against them in federal court. On appeal, the Plasmans argue that the Business Court lacked jurisdiction to enter the contempt order while their appeal from the order enforcing the injunction was pending in this Court. The Plasmans then make a series of arguments that attack the sufficiency of the contempt order itself. After careful review, we conclude that the Business Court retained jurisdiction to enter the contempt order, and that the order should be affirmed in its entirety.

I. Background

In April 2002, Plasman formed Bolier & Company, LLC (Bolier), a closely held North Carolina company offering residential furniture designs that were also suited for use in the hospitality industry. Shortly thereafter, Plasman partnered with Decca Furniture, Ltd. (Decca China), which manufactured Bolier's furniture lines. Decca China then formed Decca Furniture (USA), Inc. (Decca USA) to own Decca China's interest in Bolier. Richard Herbst (Herbst) was Decca USA's president at all relevant times.

In August 2003, Plasman and Herbst executed an operating agreement that granted Decca USA a 55% majority ownership interest in Bolier, and that allowed Plasman to retain a 45% minority ownership interest for himself. The operating agreement also vested Decca USA with the authority to make all employment decisions related to Bolier. In November 2003, Plasman entered into an employment agreement with Bolier, which provided that Plasman could be terminated without cause. Plasman executed the employment agreement on his own behalf, and Herbst signed on behalf of Decca USA and Bolier. Thereafter, Plasman

1. N.C. Gen. Stat. § 7A-27(a)(3) (2015) provides for direct appeal to the North Carolina Supreme Court from certain interlocutory orders entered by a Business Court Judge in an action designated as a mandatory complex business case on or after 1 October 2014. *See* N.C. Sess. Law 2014-102, § 9 ("Section 1 of this act becomes effective October 1, 2014, and applies to actions designated as mandatory complex business cases on or after that date."). Because this action was designated as a mandatory complex business case before 1 October 2014, the appeal is properly before this Court.

served as President and CEO of Bolier, and his son, Barrett, worked as Bolier's operations manager.

According to defendants, despite the significant investments of Decca USA and Decca China in Bolier's operations, they sustained losses in excess of $2 million between 2003 and 2012. As a result, Decca USA terminated the employment of Plasman and Barrett on 19 October 2012. The Plasmans, however, refused to accept their terminations and continued to work out of Bolier's office space. During this time, the Plasmans set up a new bank account in Bolier's name, and they diverted approximately $600,000.00 in Bolier customer payments to that account. From these diverted funds, the Plasmans paid themselves, respectively, approximately $33,170.49 and $17,021.66 in salaries and personal expenses. Plasman also wrote himself a $12,000.00 check, dated 5 December 2012, from the new account for "Bolier Legal Fees." Decca USA eventually changed the locks to Bolier's offices.

On 22 October 2012, the Plasmans filed the instant action in Catawba County Superior Court alleging claims for, *inter alia*, corporate dissolution, breach of contract, fraud, constructive fraud, and trademark as well as copyright infringement. Two days later, the action was designated as a mandatory complex business case and assigned to the North Carolina Business Court. After removing the case to the United States District Court for the Western District of North Carolina, Decca USA moved Judge Richard L. Voorhees for a preliminary injunction against the Plasmans. On 27 February 2013, Judge Voorhees entered an order (the injunction) that enjoined the Plasmans from acting on Bolier's behalf in any manner. Judge Voorhees further ordered the Plasmans to return all diverted funds to Bolier within five business days, and to provide Decca USA with an accounting of those funds. Judge Voorhees did not require Decca USA to post a security bond pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, but the injunction did contain various terms that were meant to protect Plasman's rights as a minority owner of Bolier while the litigation continued.

One week after the injunction was entered, the Plasmans filed their "Response to Court Order" in federal court, which challenged certain provisions of the injunction and stated that "Plaintiffs have fully complied to the best of their ability with the Court Order signed on February 27, 2013." Shortly thereafter, the Plasmans filed another motion that sought to have the federal court provide additional safeguards protecting "Plaintiffs Chris Plasman and Bolier . . . pending final resolution of the merits." This motion also sought to "clarify the . . . [injunction] . . . to specifically permit [the Plasmans] to retain funds paid to Chris Plasman

and Barrett Plasman for wages earned and Bolier . . . expenses paid (including the $12,000.00 paid as reimbursement for legal expenses) prior to January 14, 2013[.]" Although Judge Vorhees never ruled on these motions, the Plasmans neither appealed the injunction nor properly sought to have it reconsidered.

The action was remanded to the North Carolina Business Court in September 2014 when Judge Voorhees dismissed the Plasmans' federal copyright claims and declined to exercise supplemental jurisdiction over the state law claims that remained. Upon remand, the parties filed competing motions for consideration by Judge Louis A. Bledsoe, III. In a document entitled "Plaintiffs Motion to Amend Preliminary Injunction, to Dissolve Portions of the Preliminary Injunction and Award Damages, and Motion for Sanctions[,]" the Plasmans moved Judge Bledsoe to, *inter alia*, amend and dissolve certain portions of the injunction. In contrast, Decca USA sought to enforce the injunction's terms. Contending that the Plasmans were in willful violation of the injunction, Decca USA moved Judge Bledsoe to hold the Plasmans in civil contempt and to impose sanctions against them. After conducting a hearing on the parties' motions, Judge Bledsoe entered an order on 26 May 2015 (the 26 May Order) denying the Plasmans' motion, and reasoning that because the preliminary injunction was carefully crafted and narrowly tailored, it should not be "modified, amended, or dissolved in any respect."[2] Although Judge Bledsoe declined to hold the Plasmans in contempt, he did grant Decca USA's motion to enforce the injunction's requirements. To that end, the Plasmans were ordered to pay Decca USA $62,191.15 plus interest and to provide the accounting required by the injunction.

On 25 June 2015, the Plasmans filed notice of appeal from the 26 May Order. Defendants later filed with this Court a motion to dismiss the Plasmans' appeal, arguing that the 26 May Order was not immediately appealable because it was an interlocutory order that did not affect a substantial right of the Plasmans.

In July 2015, the Business Court, *sua sponte*, directed the parties to "submit short briefs advising the Court whether this case may proceed with further pleadings and discovery, and to a determination on the merits, or whether this case must be stayed pending resolution" of

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2. We also note that, pursuant to the 26 May Order, Judge Bledsoe dismissed claims that were purportedly brought directly in Bolier's name. Judge Bledsoe found that, as a 45% owner of Bolier, Plasman was "not authorized to bring direct claims in Bolier's name, and must instead bring such claims, if at all, as derivative claims on Bolier's behalf as one of its members."

the Plasmans' interlocutory appeal from the 26 May Order. The case was temporarily stayed to allow for the parties' submissions. On 22 September 2015, while the Plasmans' appeal was pending in this Court, defendants filed a motion in the Business Court seeking to have the Plasmans held in contempt for failure to comply with the 26 May Order.

In October 2015, Judge Bledsoe entered an order that reflected his consideration of a stay pending appeal. Relying in part on this Court's decision in *RPR & Assocs., Inc. v. Univ. of N. Carolina-Chapel Hill*, 153 N.C. App. 342, 344, 570 S.E.2d 510, 512 (2002), *cert. denied and disc. review denied*, 357 N.C. 166, 579 S.E.2d 882 (2003), Judge Bledsoe determined that he had the authority to determine whether the 26 May Order was immediately appealable. Exercising that authority, Judge Bledsoe found that "no substantial right of the Plasmans was affected by the May 26 Order" because it "simply ordered [the Plasmans] to comply with the never-appealed, legally valid and binding, 2013 [Injunction] Order requiring [the Plasmans] to return money that the Federal Court found they had diverted from Bolier." Consequently, Judge Bledsoe dissolved the temporary stay that he had entered in July 2015, and determined that the "action [would] proceed in th[e Business] Court during the pendency of the Plasmans' appeal unless otherwise ordered by the Court[.]"

After holding a show cause hearing on defendants' contempt motion, Judge Bledsoe entered an order on 26 February 2016 (the Contempt Order) concluding that the Plasmans were in civil contempt of court because of their willful noncompliance with the 26 May Order. The Contempt Order contained a finding that repeated Judge Bledsoe's previous determination that "the appeal of the May 26 Order was interlocutory, did not affect a substantial right, and . . . did not stay the case." The Plasmans filed notice of appeal from the Contempt Order on 24 March 2016.

Roughly eight months later, in November 2016, this Court filed an opinion that dismissed the Plasmans' interlocutory appeal from the 26 May Order. *See Bolier & Co., LLC v. Decca Furniture (USA), Inc.*, __ N.C. App. __, 792 S.E.2d 865 (2016) (*Bolier I*). This Court reached three conclusions in support of its holding that the Plasmans had failed to demonstrate the loss of a substantial right absent immediate review of the 26 May Order:

> First, we conclude that Judge Voorhees' Order was, in fact, appealable. It is well settled that preliminary injunction orders issued by a federal court are immediately appealable. . . .

> Second, Plaintiffs contend that their subsequent filings in federal court tolled their deadline for appealing Judge Voorhees' Order. We disagree. . . .
>
> Had Plaintiffs intended to seek reconsideration of Judge Voorhees' Order so as to toll their deadline for appealing the preliminary injunction, they were required to file a motion that unambiguously sought such relief. However, they failed to do so. While Plaintiffs may have held out hope that the federal court would nevertheless modify its preliminary injunction as a result of their motion, it was still incumbent upon them to protect their appeal rights during the interim by taking an appeal of Judge Voorhees' Order to the Fourth Circuit within the thirty-day deadline provided by Rule 4 of the Federal Rules of Appellate Procedure. . . .
>
> Finally, we reject Plaintiffs' argument that [the 26 May] Order was independently appealable. The specific aspects of [the 26 May] Order cited by Plaintiffs as depriving them of a substantial right are essentially identical to the preliminary injunction terms contained in Judge Voorhees' Order, which Plaintiffs never appealed. Thus, because Judge Bledsoe's Order merely enforces the preliminary injunction entered by Judge Voorhees, our consideration of the substantive issues raised by Plaintiffs in the present appeal would enable them to achieve a "back door" appeal of Judge Voorhees' Order well over three years after its entry.

Id. at __, 792 S.E.2d at 872 (internal citations omitted). In sum, the *Bolier I* Court determined that the 26 May Order "simply reiterate[d] that [the Plasmans were] . . . bound to comply with the federal preliminary injunction that was entered on 27 February 2013." *Id.* at __, 792 S.E.2d at 873.

The Plasmans now appeal from the Contempt Order.

II. Trial Court's Jurisdiction To Enter The Contempt Order

[1] As an initial matter, we address the Plasmans' argument that their appeal from the 26 May Order stayed all proceedings in the Business Court and left the trial court without jurisdiction to enter the Contempt Order.

Under North Carolina law, the longstanding general rule is that an appeal divests the trial court of jurisdiction over a case until the appellate

court returns its mandate. *E.g.*, *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977); *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 388 (1972). Our legislature has codified this rule at N.C. Gen. Stat. § 1-294 (2015), which provides that:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure;[3] but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. . . .

Pending the appeal, the trial judge is *functus officio*, *Bowen*, 292 N.C. at 635, 234 S.E.2d at 749, which is defined as being "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." Black's Law Dictionary 743 (9th ed. 2009).

For over a century, the Supreme Court has recognized that an appeal operates as a stay of all proceedings at the trial level as to issues that are embraced by the order appealed. *E.g.*, *Bohannon v. Virginia Trust Co.*, 198 N.C. 702, 153 S.E. 263 (1930); *Pruett v. Charlotte Power Co.*, 167 N.C. 598, 83 S.E. 830 (1914). This is section 1-294 in a nutshell, for the statute itself draws a distinction between trial court's inability to rule on matters that are inseparable from the pending appeal and the court's ability to proceed on matters that are "not affected" by the pending appeal. *See* N.C. Gen. Stat. § 1-294 (2015). This jurisdictional issue often arises in the context of interlocutory orders.

In *Veazey v. Durham*, our State's high court examined the question of the circumstances under which the appeal of an interlocutory order operates as a stay of the proceedings in the trial court. 231 N.C. 357, 57 S.E.2d 377 (1950). Speaking through Justice Ervin, the Supreme Court drew a clear distinction between the effect of immediately appealable and nonappealable interlocutory orders on a trial court's continuing jurisdiction:

> When a litigant takes an appeal to the Supreme Court from an appealable interlocutory order of the Superior Court and perfects such appeal in conformity to law, the appeal

3. The Supreme Court has yet to create exceptions to the general rule codified at section 1-294.

> operates as a stay of all proceedings in the Superior Court relating to the issues included therein until the matters are determined in the Supreme Court. G.S. Sec. 1-294. . . .
>
> But this sound principle is not controlling upon the record in the case at bar. . . .
>
> There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, i.e., to administer 'right and justice * * * without sale, denial, or delay.' N.C. Const. Art. I, Sec. 35.
>
> This being true, *a litigant cannot deprive* the Superior Court of jurisdiction to try and determine a case on its merits *by taking an appeal* to the Supreme Court *from a nonappealable interlocutory* order of the Superior Court. A contrary decision would necessarily require an acceptance of the paradoxical paralogism that a party to an action can paralyze the administration of justice in the Superior Court by the simple expedient of doing what the law does not allow him to do, i.e., taking an appeal from an order which is not appealable. . . .
>
> [W]hen an appeal is taken to the Supreme Court from an interlocutory order of the Superior Court which is not subject to appeal, the Superior Court need not stay proceedings, but may disregard the appeal and proceed to try the action while the appeal on the interlocutory matter is in the Supreme Court.

Id. at 363-64, 57 S.E.2d at 382-83 (emphasis added and internal citations omitted). Justice Ervin then carefully reiterated that *an improper interlocutory appeal never deprives a trial court of jurisdiction over a case*:

> We close this opinion with an admonition given by this Court to the trial bench three-quarters of a century ago: "But certainly when an appeal is taken as in this case from an interlocutory order from which no appeal is allowed by The Code, which is not upon any matter of law and which

> affects no substantial right of the parties, it is the duty of the Judge to proceed as if no such appeal had been taken."

Id. at 367, 57 S.E.2d at 385 (quoting *Carleton v. Byers*, 71 N.C. 331, 335 (1874)).

There is no doubt that the 26 May Order was interlocutory. Ordinarily, "there is no right of immediate appeal from interlocutory orders and judgments." *Travco Hotels, Inc. v. Piedmont Nat. Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992) (citation omitted). However, an interlocutory order is subject to immediate review[4] when it "affects a substantial right that 'will clearly be lost or irremediably adversely affected if the order is not review[ed] before final judgment.' " *Edmondson v. Macclesfield L-P Gas Co.*, 182 N.C. App. 381, 391, 642 S.E.2d 265, 272 (2007) (quoting *Blackwelder v. Dept. of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)); *see* N.C. Gen. Stat. § 1-277(a) (2015) ("An appeal may be taken from every judicial order or determination of a [trial] judge . . . which affects a substantial right claimed in any action or proceeding[.]"); N.C. Gen. Stat. § 7A-27(b)(3) (2015) (providing a right of appeal from any interlocutory order that, *inter alia*, affects a substantial right).

"Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal from final judgment." *Goldston v. Am Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Our Supreme Court has adopted the dictionary definition of "substantial right": " 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right.' " *Oestreicher v. Am. Nat. Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (quoting Webster's Third New International Dictionary 2280 (1971)). Even so, "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

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4. Immediate review of interlocutory orders is also available when the trial court certifies, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, that there is no just reason to delay appeal of its order or judgment. *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999).

Apart from the muddy waters of the substantial right test, there is also the issue of what authority a trial court possesses to rule on the interlocutory nature of an appeal. *Veazy* states that the "[trial c]ourt need not stay proceedings, but may *disregard* the appeal and proceed to try the action *while the appeal on the interlocutory matter* is in the Supreme Court." 231 N.C. at 364, 57 S.E.2d at 383 (emphasis added). Before an interlocutory appeal is properly "disregarded" and the action proceeds, a substantial right analysis must be conducted at the trial level during the pendency of the appeal. To that end, a line of cases from this Court establishes that a trial judge is authorized to determine if an attempted appeal is of a nonappealable interlocutory order[5] and to decide whether the trial court has jurisdiction to proceed once an appeal has been noticed. *See, e.g.*, *T&T Dev. Co. v. S. Nat. Bank of S.C.*, 125 N.C. App. 600, 603, 481 S.E.2d 347, 349 (1997) ("[B]ecause plaintiffs had no right to appeal the granting of the motion *in limine*, the trial court was not deprived of jurisdiction and did not err in calling the case for trial."); *Velez v. Dick Keffer Pontiac GMC Truck, Inc.*, 144 N.C. App. 589, 591, 551 S.E.2d 873, 875 (2001) (recognizing that "a litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order of the trial court").

In *RPR & Assocs.*, this Court established the parameters of the authority of the trial court in making this determination, stating:

> Because the trial court had the authority to determine whether its order affected defendant's substantial rights or was otherwise immediately appealable, the trial court did not err in continuing to exercise jurisdiction over this case after defendant filed its notice of appeal. The trial court's determination that the order was nonappealable was reasonable in light of established precedent and the repeated denials by the appellate courts of this State to stay proceedings. Although this Court ultimately held that defendant's appeal affected a substantial right, it also held that defendant was not immune to suit. Defendant states no grounds, nor has it produced any evidence to

5. This inquiry is not always straightforward, as the appealability of a particular type of order may not be well established. Whether or not an interlocutory order is immediately appealable will ultimately be decided in the appellate division, but the cases that follow focus on the trial court's decision to continue to exercise jurisdiction over a case during the pendency of an appeal.

> demonstrate how it was prejudiced by the trial court's exercise of jurisdiction over this case.

153 N.C. App. at 349, 570 S.E.2d at 515. With the decision in *RPR & Assocs.*, the concepts of reasonableness and prejudice are injected into the appellate court's analysis.

This Court recently applied *RPR & Assocs.*' analytical framework in the context of a civil contempt order. *See SED Holdings, LLC v. 3 Star Properties, LLC*, __ N.C. App. __, 791 S.E.2d 914 (2016). In *SED Holdings*, the plaintiff secured an injunction that prohibited the defendants from selling or disposing of certain pools of residential mortgage loans. *Id.* at __, 791 S.E.2d at 917. The defendants appealed the injunction. *Id.* This Court determined that the interlocutory appeal affected a substantial right, but ultimately affirmed the injunction. *SED Holdings, LLC v. 3 Star Properties, LLC*, __ N.C. App. __, __, __, 784 S.E.2d 627, 630, 632 (2016) ("*SED I*").

While the appeal in *SED I* was pending, the defendants failed to comply with the injunction, prompting the trial court to hold a series of contempt proceedings. *SED Holdings*, __ N.C. App. at __, 791 S.E.2d at 917. In a show cause order, the trial court specifically "concluded . . . that: (1) the injunction did not affect a substantial right of defendants and was thus not immediately appealable, and (2) the trial court retained jurisdiction to enforce the terms of its injunction while defendants' appeal was pending in [the] Court [of Appeals]." *Id.* at __, 791 S.E.2d at 918. Before the decision in *SED I* was filed, the trial court entered an order holding the defendants in civil contempt. *Id.* On appeal to this Court, the defendants argued that the contempt order was a nullity, as their appeal from the injunction in *SED I* divested the trial court of jurisdiction to hold contempt proceedings on the defendants' willful noncompliance with the injunction's terms. *Id.*

In rejecting the defendants' argument, this Court recognized that

> [a]t the very least, *RPR & Assocs.* stands for two general propositions: (1) a trial court properly retains jurisdiction over a case if it acts reasonably in determining that an interlocutory order is not immediately appealable, and (2) that determination may be considered reasonable even if the appellate court ultimately holds that the challenged order is subject to immediate review.

Id. at __, 791 S.E.2d at 920. The *SED Holdings* Court then reasoned as follows:

> It is clear that injunctive orders entered only to maintain the status quo pending trial are not immediately appealable. Then again, reasonable minds may disagree as to whether a particular injunction simply maintains the status quo. Beyond that, our courts have taken a flexible approach with respect to the appealability of orders granting injunctive relief. Most relevant to this case, orders affecting a party's ability to conduct business or control its assets may or may not implicate a substantial right. . . .
>
> Because the injunctive relief was designed to maintain the status quo, and given that established precedent regarding the appealability of such orders is equivocal, the trial court reasonably concluded that its injunction was not immediately appealable. While this Court eventually held in *SED I* that defendants' appeal affected a substantial right, that decision was not dispositive of whether the trial court acted reasonably in determining that the appeal had not divested it of jurisdiction. *RPR & Assocs.*, 153 N.C. App. at 348, 570 S.E.2d at 514. As such, the trial court was not *functus officio*. This Court also held that the trial court's ruling on SED's motion for injunctive relief was not erroneous. Defendants therefore cannot demonstrate how they were "prejudiced by the trial court's [decision to continue to] exercise . . . jurisdiction over this case" by enforcing its injunction. *Id.* Accordingly, pursuant to the principles announced in *RPR & Assocs.*, we conclude that the trial court retained jurisdiction to enter orders related to the contempt proceedings in this case while defendants' interlocutory appeal was pending in this Court.

Id. at __, 791 S.E.2d at 921-22 (internal citations omitted).

Applying the principles of *Veazy* as well as the analytical framework established in *RPR & Assocs.* and reaffirmed in *SED Holdings* to the present case, we conclude that Judge Bledsoe properly retained jurisdiction to enter the Contempt Order while the Plasmans' appeal from the 26 May Order was pending in this Court. After the Plasmans noted their appeal from the 26 May Order, Judge Bledsoe, *sua sponte*, addressed the issue of whether the Business Court's jurisdiction was stayed pending the appeal. Upon careful consideration of the parties' briefs and arguments on this issue, Judge Bledsoe unequivocally concluded that the 26 May Order did not affect any substantial right of the Plasmans. According to Judge Bledsoe, the 26 May Order was

not immediately appealable because it "simply ordered [the Plasmans] to comply with the never-appealed" injunction order. Judge Bledsoe reiterated this conclusion in the Contempt Order.

This Court agreed with Judge Bledsoe's analysis, and specifically refused to allow the Plasmans to mount a collateral attack on the injunction via the 26 May Order that was entered to enforce it. *See Bolier I*, __ N.C. App. at __, 792 S.E.2d at 872. Consequently, unlike in *SED Holdings*, it is irrelevant whether the injunction at issue maintained the status quo or went further. The May 26 Order, which was the subject of the contempt proceedings, was not an injunction; it was an enforcement mechanism. Given the procedural context of this case, and the Business Court's careful attention to the effect (or lack thereof) of the Plasmans' appeal from the 26 May Order on its jurisdiction, Judge Bledsoe's decision to proceed with the case was proper and reasonable. So too was Judge Bledsoe's determination that the Plasmans' pending interlocutory appeal did not deprive him of jurisdiction to enforce the 26 May Order. Furthermore, the Plasmans have not, and cannot, demonstrate that they were prejudiced by Judge Bledsoe's decision to enforce an order that directed the Plasmans to comply with a prior, never-appealed injunction.

Nevertheless, the Plasmans argue that this Court's recent decision in *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, __ N.C. App. __, 794 S.E.2d 535 (2016) should control our analysis. In *Tetra Tech*, after not getting paid for its work on construction projects at Fort Bragg, the plaintiff sued the defendant-general contractor and the trial court later entered an injunction that required the general contractor "to segregate funds related to the construction projects and not to pay those funds out without court approval." *Id.* at __, 794 S.E.2d at 537. The defendant moved the trial court, pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure, to modify the injunction. *Id.* Although the trial court refused to modify the injunction in the manner requested by the defendant, the court did modify the injunction's terms. *Id.* The defendant filed notice of appeal from the denial of its motion to modify and from the underlying injunction "on the ground that the time to appeal that order was 'tolled' by its motion to modify, which purportedly was filed under Rules 59 and 60." *Id.* at __, 794 S.E.2d at 538. Roughly two months later, the trial court "issued orders holding [the defendant] in contempt for violating the preliminary injunction and dismissing [the defendant's] counterclaims with prejudice as a sanction." *Id.* The defendant also appealed from those orders. *Id.*

On appeal, this Court concluded that it lacked jurisdiction to review the defendant's "appeal from the preliminary injunction order because

[it] did not appeal that order within thirty days and its motion to modify the preliminary injunction order, purportedly brought under Rules 59 and 60 of the Rules of Civil Procedure, did not toll the time to appeal." *Id.* at __, 794 S.E.2d at 540. However, the *Tetra Tech* Court went on to conclude that the trial court's denial of the defendant's motion to modify the injunction affected a substantial right and was immediately appealable, and that the trial court's denial of the defendant's requested modifications to the injunction did not constitute an abuse of discretion. *Id.* Finally, the *Tetra Tech* Court vacated the contempt and sanctions orders because the defendant's appeal from the denial of its motion to modify the injunction divested the trial court's jurisdiction over the matter. *Id.* at __, 794 S.E.2d at 541.

In holding that "the trial court lacked jurisdiction to conduct a contempt proceeding and impose sanctions[,]" *id.*, the *Tetra Tech* Court relied on *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962), in which our Supreme Court addressed an order for alimony pendente lite and child custody and held that the order was not enforceable by contempt while the order was on appeal. The *Tetra Tech* Court then distinguished its holding from the decision in *SED Holdings* as follows:

> This Court recently held that there is an exception to the *Joyner* rule: "a trial court properly retains jurisdiction over a case if it acts reasonably in determining that an interlocutory order is not immediately appealable." *SED Holdings, LLC v. 3 Star Prop., LLC*, __ N.C. App. __, __, 791 S.E.2d 914, 920 (2016). The analysis in *SED Holdings* turned on the fact that the injunction at issue merely maintained the status quo. That is not the case here. This injunction was a mandatory one; it forced a business to segregate its funds, imposed controls on the business's operations, and forced the business to conduct an accounting and provide the results of that accounting to the opposing party. Thus, when [the defendant] appealed the denial of its motion to modify that injunction, the trial court was divested of jurisdiction to enforce it.

Tetra Tech, __ N.C. App at __ n.3, 794 S.E.2d at 541 n.3.

Despite the Plasmans' argument to the contrary, *Tetra Tech* is easily distinguished from the present case. To begin, the decision in *Joyner*—the only case upon which the *Tetra Tech* Court relied in vacating the contempt order at issue—was rendered upon the "general rule . . . that a duly perfected appeal or writ of error divests the trial court of further

jurisdiction of the cause in which the appeal has been taken." *Joyner*, 256 N.C. at 591, 124 S.E.2d at 726. The *Joyner* Court, unlike Judge Bledsoe, apparently had no reason to address the effect of an appeal of a nonappealable interlocutory order on a trial court's jurisdiction. In addition, *Tetra Tech* involved an appeal from the denial of a motion to modify an injunction that imposed substantial restrictions on the defendant's ability to conduct its business and required the defendant to provide extensive accountings to the plaintiff. Here, the underlying injunction simply restored the status quo by requiring the Plasmans to provide an accounting of the *diverted* funds, and to return *those funds* to Decca USA's (or Bolier's) corporate coffers. Finally, this case involves a trial court's decision to enforce the terms of an interlocutory order after citing *RPR Assocs.* and making a specific determination that the order was not immediately appealable, whereas *Tetra Tech* involved no such determination. Indeed, the *Tetra Tech* Court may have reached a different decision on the contempt order at issue had it not determined that the defendant's motion to modify was not immediately appealable.

Because the decisions in *Veazy*, *RPR Assocs.*, and *SED Holdings* control our analysis, we conclude that the Plasmans' appeal from the 26 May Order, which Judge Bledsoe and this Court determined was not immediately appealable, did not divest the Business Court of jurisdiction over the case. As a result, Judge Bledsoe was not *functus officio* when the Plasmans noted their appeal from the 26 May Order, and the Contempt Order was properly entered. *See Onslow Cty. v. Moore*, 129 N.C. App. 376, 387-88, 499 S.E.2d 780, 788 (1998) (rejecting a party's argument that, under *Joyner*, "the appeal of an underlying judgment stays contempt proceedings until the validity of the judgment is determined[,]" ' and concluding that "[b]ecause the order issuing the injunction was interlocutory and no substantial right of [the party] was affected by the denial of immediate appellate review, the trial court was not divested of jurisdiction and could therefore properly hold [him] in contempt for violating the injunction").

III. Scope Of The Plasmans' Appeal

[2] Because the Plasmans purport to raise eight issues on appeal, we must determine whether all of those issues are properly before us. The "Issues Presented" section of the Plasmans' principal brief lists the following issues for our consideration:

> I. Whether The Trial Court Erred In Considering An Appealed Order And Finding Plasman In Contempt Of An Appealed Order?

II. Whether The Trial Court Erred In Finding That The Purpose Of The Preliminary Injunction Order Is Still Served By Requiring Payment Of Money To Decca USA?

III. Whether The Trial Court Erred By Finding Failure To Pay Money To Defendants After Proper Appeal Amounts To Willful, Bad Faith Non-Compliance?

IV. Whether The Trial Court Erred By Finding That Appellants Diverted Bolier's Money And Directing That Decca USA Be Paid?

V. Whether The Trial Court Erred By Failing To Find That The Federal Court Did Not Issue Required Rule 65 Security, And Failing To Find That Decca USA Has Continuously Deprived Plasman Of Statutorily Protected Member-Manager Rights?

VI. Whether The Trial Court Erred By Failing To Find That Decca USA Failed To Perform Material Terms Of The Preliminary Injunction Thereby Rendering The Injunction Unenforceable?

VII. Whether The Trial Court Erred In Requiring The Appellants To Pay Interest While Appellants Waited On Clarification Of The Court's Order?

VIII. Whether The Trial Court Erred In Considering Jointly Titled Assets And IRAs Exempt From Collection To Determine Appellants Ability To Comply With Order?

(All Caps Omitted).

Issue I has already been addressed and resolved in Section II above. After a careful review of the Plasmans' principal brief, we conclude that Issues IV, V, and VII have not been properly argued or presented. As a result, those arguments are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Issues II, III, VI, and VIII have been specifically argued on appeal, and each issue is addressed below.

IV. Discussion of the Contempt Order's Merits

A. Appellate Jurisdiction

[3] The Contempt Order is interlocutory, as it did not resolve all matters before the trial court in this case. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381 ("An interlocutory order is one made during the pendency of

an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.") (citation omitted). As noted above, interlocutory orders are generally not appealable unless certified by the trial court pursuant to Rule 54(b) or unless a substantial right of the appellant would be lost or jeopardized absent immediate review. *See, e.g.*, *Larsen v. Black Diamond French Truffles, Inc.*, __ N.C. App. __, __, 772 S.E.2d 93, 95 (2015). "The appeal of any contempt order . . . affects a substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002) (citing *Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976)). Accordingly, the Plasmans' appeal of the Contempt Order is properly before this Court.

B. Standard of Review and Generally Applicable Law

"In contempt proceedings[,] the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978)(citation omitted). Our review of a contempt order, therefore, "is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Middleton v. Middleton*, 159 N.C. App. 224, 226, 583 S.E.2d 48, 49 (2003) (citations and internal quotation marks omitted).

N.C. Gen. Stat. § 5A-21(a) (2015) provides:

> Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

Civil contempt is designed to coerce compliance with a court order. *Adkins v. Adkins*, 82 N.C. App. 289, 293, 346 S.E.2d 220, 222 (1986).

C. Whether The Order's Purpose May Be Served By Compliance

[4] The Plasmans argue that the purpose of the 26 May Order can no longer be served by requiring them to return to Decca USA the funds they diverted from Bolier after their terminations took effect. In making this argument, the Plasmans assert that the 26 May Order "erroneously and impermissibly awarded damages, not a fine permitted by contempt[.]" The Plasmans also contend that the payment of money was not necessary to avoid irreparable harm to Decca USA, i.e., "[t]here is no evidence that [Decca] USA needed [the] purported . . . 'diverted money' to preserve [its] majority control of Bolier." These arguments are wholly lacking in merit.

Whether the issuance of the injunction was necessary to avoid irreparable harm to Decca USA was an issue ripe for Judge Voorhees' consideration in federal court. *See Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) (recognizing that "parties seeking preliminary injunctions [must] demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest"). But the 26 May Order is not an injunction; it is an order entered to *enforce* an injunction. In the Contempt Order, Judge Bledsoe specifically found "that the purpose of the May 26 Order to enforce the Federal Court [Injunction] Order's directive that the Plasmans return the diverted funds to Decca USA [] may still be served by compliance with the Order." This finding was in harmony with this Court's conclusion in *Bolier I* that Judge Bledsoe entered the 26 May Order "simply [to] enforc[e] the ruling in Judge Voorhees' Order ordering [the Plasmans] to return to Decca USA all of the funds that the Plasmans had diverted from Bolier." *Bolier I*, __ N.C. App. at __, 792 S.E.2d at 872. Our review of the record reveals that the Plasmans have yet to return the diverted funds. We need say little more than that the purpose of the 26 May Order—to enforce compliance with the injunction's terms, including the requirement that funds diverted from Bolier's bank accounts be returned to Decca USA—could still be served by compliance with the 26 May Order. To address the Plasmans' arguments any further would permit them to mount an impermissible collateral attack on the underlying injunction. We refuse, as did the *Bolier I* Court, to "enable [the Plasmans] to achieve a 'back door' appeal of Judge Voorhees' Order well over three years after its entry." *Id.* at __, 792 S.E.2d at 872.

D. Willful Noncompliance

[5] The Plasmans next argue that Judge Bledsoe erroneously found that their noncompliance with the 26 May Order was willfill. Curiously,

the Plasmans assert that the time frame in which they could appeal the injunction was tolled by the subsequent motions for modification and clarification, a contention that the *Bolier I* Court squarely rejected. *See Bolier I*, __ N.C. App. at __, 792 S.E.2d at 872. Beyond that, the Plasmans argue that they acted in good faith and pursuant to "proper legal process," and that the trial court lacked jurisdiction to enter any ruling—including the Contempt Order—once notice of appeal from the 26 May Order was given. According to the Plasmans, their "understanding that [the appeal] divested the trial court of jurisdiction to continue contempt proceedings necessarily prevented [them] from being found in willful, bad faith disobedience." We disagree.

As an initial matter, we have already concluded above that the trial court *did* have jurisdiction to enter the Contempt Order. Furthermore, the record supports Judge Bledsoe's finding that the Plasmans were in willfill noncompliance of the 26 May Order at the time the Contempt Order was entered.

" 'Willful' has been defined as disobedience which imports knowledge and a stubborn resistance, and as something more than an intention to do a thing. It implies doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether [the contemnor] has the right or not—in violation of law[.]" *Hancock v. Hancock*, 122 N.C. App. 518, 523, 471 S.E.2d 415, 418 (1996) (citation and other internal quotations marks omitted). The term willfulness "involves more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983) (citations omitted). Consequently, "[w]illfulness in a contempt action requires either a positive action (a 'purposeful and deliberate act') in violation of a court order or a stubborn refusal to obey a court order (acting 'with knowledge and stubborn resistance')." *Hancock*, 122 N.C. App. at 525, 471 S.E.2d at 419 (citation omitted).

In the present case, Judge Bledsoe made the following findings:

> {17} . . . In the P.I. Order, the Federal Court first ordered the Plasmans to return to Decca USA's Bank of America lockbox all of Bolier & Co.'s monies, including but not limited to customer payments, diverted to them. . . . This requirement arose out of the Plasmans' purported removal of Bolier funds from Decca USA accounts between the date of their employment termination on October 19, 2012 and the date when they were finally locked out of Bolier's premises on January 14, 2013. The Plasmans used these

funds to pay their purported wages, expenses, and attorney's fees after their employment was terminated.

{18} The Plasmans did not return the funds as ordered by the Federal Court, and after the matter was remanded to this Court, the Court, in its May 26 Order, granted Decca USA's Motion to Enforce [the Federal Court's P.I.] Order . . . .

{19} The Plasmans have not yet returned to Decca USA the diverted funds. The Plasmans never appealed the Federal Court P.I. Order and only filed a response to [the] Court Order seeking clarification as to the order to repay diverted funds. The Federal Court did not respond to the Plasmans' Response prior to remand. On June 25, 2015, the Plasmans filed a Notice of Appeal of this Court's May 26 Order, including the portions of the Order enforcing the Federal Court P.I. Order's requirement that the Plasmans return the diverted funds.

{20} This Court subsequently concluded that because the May 26 Order "simply ordered [the] Plasmans to comply with the never-appealed, legally valid and binding, 2013 P.I. Order," the appeal of the May 26 Order was interlocutory, did not affect a substantial right, and therefore did not stay the case. . . .

{21} After this Court concluded that the case was not stayed, the Plasmans continued not to comply with the May 26 Order and again filed a motion to clarify this Court's holding. The Court again affirmed its conclusion that the appeal of the May 26 Order did not stay the case or affect a substantial right. . . . The Plasmans have continued to refuse to comply with the May 26 Order's directive to return the diverted funds.

{22} After the Court issued the Show Cause Order, the Plasmans, rather than complying with the Show Cause Order's instruction to submit evidence for *in camera* review or making a good faith effort to seek clarification, submitted, only minutes before the filing deadline, a document entitled Objections to Show Cause Production, Notice of Conditional Intent to Comply with Show Cause, and Request for Clarification ("Request"). The Court found

> that filing to be "procedurally improper, substantively without merit, and completely baseless as a purported excuse [not] to comply with the clear terms of the Court's Show Cause Order. . . ."
>
> {23} While the May 26 Order found that the Plasmans' response to the Federal Court's P.I. Order reflected "a genuine dispute (or at least the Plasmans' genuine confusion) concerning [their obligations]," . . . *the Court finds that the Plasmans' belabored and continuing refusal to return the diverted funds in the face of this Court's repeated directives to do so reflects "knowledge and stubborn resistance" to the May 26 Order. The Court also finds that the Plasmans have acted with a "bad faith disregard for authority and the law" by improperly seeking to reargue the merits of the May 26 Order in this Court and the Court's conclusion that the matter is not stayed pending appeal. The Court therefore finds that the Plasmans are in willful noncompliance of the May 26 Order.*

(Emphasis added and internal citations omitted).

As summarized above, the Plasmans did not comply with the injunction's terms. Although the 26 May Order enforced the injunction and identified the exact amount of funds to be returned—$62,192.15 plus applicable interest—the Plasmans repeatedly filed motions in the Business Court that sought clarification of what was already clear: they were required to return the diverted funds to Decca USA. The Plasmans also stubbornly refused to accept Judge Bledsoe's conclusions that the appeal from the 26 May Order did not divest the Business Court's jurisdiction over the case, and that the trial level proceedings would not be stayed. The record is replete with instances in which the Plasmans acted with "knowledge" of and "stubborn resistance" to the 26 May Order's clear directives. *Hancock*, 122 N.C. App. at 525, 471 S.E.2d at 419. Accordingly, Judge Bledsoe's finding that the Plasmans were in willful noncompliance with that order is supported by competent evidence.

E. Decca USA's Purported Noncompliance with the Injunction and 26 May Order

[6] The Plasmans also argue that the injunction and the 26 May Order are no longer enforceable because Decca USA has refused to comply with both orders' requirement that the Plasmans be provided with certain information concerning Bolier's operations. We disagree.

In making this argument, the Plasmans simply complain about relief they have not obtained from Judge Bledsoe regarding disputes outside the scope of this appeal. According to the Plasmans, "Judge Bledsoe has repeatedly failed to find that [Decca USA] has not provided [Chris] Plasman with the information or access to Bolier. To the contrary, Judge Bledsoe has repeatedly stayed discovery, refused to compel [Decca USA] to provide information." The Plasmans also argue that the Business Court was required to "issue [an] adequate [Rule 65] security bond" before the injunction could be enforced.

The gravamen of these contentions is that the 26 May Order lacked essential findings and was erroneous. Even assuming that Judge Bledsoe should have made certain findings concerning Decca USA's compliance with the injunction, those findings would be immaterial to a determination of whether the Plasmans had complied with *their own* obligations under the injunction. Furthermore, "[a]n erroneous order is one 'rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles.' " *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) (citation omitted). "An erroneous order may be remedied by appeal; it may not be attacked collaterally." *Id.* (citation omitted). This Court has already dismissed the Plasmans appeal in *Bolier I*. Thus, regardless of whether the 26 May Order was properly issued or not, it could not simply be ignored by the Plasmans. Even if Decca USA has not complied with its responsibilities under the injunction (as enforced by the 26 May Order), the Plasmans' obligation to return the diverted funds remains in place. Accordingly, this argument is without merit.

F. The Plasmans' Ability To Comply With The 26 May Order

[7] Finally, the Plasmans argue that Judge Bledsoe improperly considered their jointly-held bank accounts and their individually-held investment retirement accounts (IRAs) in assessing the Plasmans' present ability to comply with the 26 May Order. Once again, we disagree.

"In determining a contemnor's present ability to pay, the appellate courts of this state have directed trial courts to 'take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition.' " *Gordon v. Gordon*, 233 N.C. App. 477, 484, 757 S.E.2d 351, 356 (2014) (quoting *Bennett v. Bennett*, 21 N.C. App. 390, 393-94, 204 S.E.2d 554, 556 (1974)). "Considering how a contemnor pays his expenses is an important part of this analysis." *Id.* "The majority of cases have held that

to satisfy the 'present ability' test defendant must possess some amount of cash, or asset readily converted to cash." *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985). However, "[t]he standard is not having property free and clear of any liens, but rather that one has the present means to comply with the court order and hence to purge oneself of the contempt." *Adkins*, 82 N.C. App. at 291, 346 S.E.2d at 222. "Reasonable measures may well include liquidating equity in encumbered assets." *Id.* at 291-92, 346 S.E.2d at 222.

The Plasmans rely exclusively on *Spears v. Spears*, __ N.C. App. __, 784 S.E.2d 485 (2016) to argue that jointly-titled assets—here, joint checking and savings accounts—cannot be used to determine a party's ability to comply with a contempt order. In *Spears*, this Court vacated a contempt order because, *inter alia*, the trial court faulted the defendant-husband "for failing to force his second wife to sell their beach house despite the fact that defendant testified that they owned the house as tenants by the entirety." *Id.* at __, 784 S.E.2d at 496. However, the *Spears* Court simply recognized the statutory rule that a husband cannot not force his wife to sell, lease, transfer, or otherwise liquidate certain real property when that property is held as a tenancy by the entireties. *Id.* (citing N.C. Gen. Stat. § 39-13.6(a) (2013) ("Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse.")).

Spears has no application here, for the protections afforded real property held by spouses as tenants by the entirety do not apply in this instance. Therefore, the jointly-held bank accounts at issue were properly considered in Judge Bledsoe's evaluation of the Plasmans' ability to comply.

We reach the same conclusion concerning the individual IRAs held by the Plasmans. Indeed, this Court has previously held that a trial court properly considered funds in a defendant's retirement account in determining that the defendant had the present ability to pay alimony arrears and purge himself of civil contempt. *Tucker v. Tucker*, 197 N.C. App. 592, 597, 679 S.E.2d 141, 144 (2009) ("Thus, the trial court properly considered the assets that defendant had available at the time of the hearing to satisfy the $10,000.00 payment towards the alimony arrears and specifically based its conclusion regarding defendant's ability to pay upon the fact that defendant had available, *inter alia*, $6,200.00 from his 401K account and a $2,000.00 cashier's check, which together would comprise $8,200.00 of the $10,000.00."). Accordingly, Judge Bledsoe's inventory of the Plasmans' financial condition properly took account of their jointly-held bank accounts and their individual IRAs, and it was not error to

consider these assets when assessing the Plasmans' present ability to comply with the 26 May Order and return the diverted funds to Bolier.

V. Conclusion

For the reasons stated above, we conclude that the trial court had jurisdiction to hold the Plasmans in civil contempt, and that the Contempt Order should be affirmed in its entirety.

AFFIRMED.

Judges BRYANT and INMAN concur.

RADIATOR SPECIALTY COMPANY, PLAINTIFF

v.

ARROWOOD INDEMNITY COMPANY (AS SUCCESSOR TO GUARANTY NATIONAL INSURANCE COMPANY, ROYAL INDEMNITY COMPANY AND ROYAL INDEMNITY COMPANY OF AMERICA); COLUMBIA CASUALTY COMPANY; CONTINENTAL CASUALTY COMPANY; FIREMAN'S FUND INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; LANDMARK AMERICAN INSURANCE COMPANY; MUNICH REINSURANCE AMERICA, INC. (AS SUCCESSOR TO AMERICAN REINSURANCE COMPANY); MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; PACIFIC EMPLOYERS INSURANCE COMPANY; ST. PAUL SURPLUS LINES INSURANCE COMPANY; SIRIUS AMERICA INSURANCE COMPANY (AS SUCCESSOR TO IMPERIAL CASUALTY AND INDEMNITY COMPANY); UNITED NATIONAL INSURANCE COMPANY; WESTCHESTER FIRE INSURANCE COMPANY; ZURICH AMERICAN INSURANCE COMPANY OF ILLINOIS, DEFENDANTS

No. COA16-638

Filed 16 May 2017

1. Appeal and Error—interlocutory orders—partial summary judgment—non-collateral issues remaining—not a final judgment

In a complex liability insurance case involving a company that manufactured products containing benzene and asbestos, partial summary judgment orders were interlocutory even though defendant-Fireman's Fund Insurance Company contended that the orders constituted a final judgment for appellate purposes. Certain coverage disputes were resolved, but non-collateral issues remained, including damages and the individual claims of plaintiff against defendant-National Union Fire Insurance Company.

2. Appeal and Error—interlocutory orders—substantial right exception—duty to defend—unidentified pending claims—appeal dismissed

The Court of Appeals dismissed the appeals of the manufacturer of products containing benzene and asbestos (Radiator Specialty Company (RSC)) in a case that involved multiple liability insurance companies. While RSC contended that partial summary judgment and other orders affected its substantial right to duty-to-defend coverage, the duty-to-defend substantial right exception has never been applied to orders that resolve ancillary coverage disputes with respect to numerous unidentified claims. RSC made a bare citation to *Cinoman v. Univ. of N. Carolina*, 234 N.C. App. 481 (2014), without application or analysis and did not establish that *Cinoman* controlled here. Furthermore, RSC never explained the practical impact that applying any of these orders (including allocation and trigger orders for determining coverage and costs) would have on its right to insurance defense in any allegedly pending claim.

3. Appeal and Error—interlocutory order—multiple insurance companies—trigger order for coverage—substantial right not affected

In a case involving a manufacturer of products containing benzene and asbestos and multiple liability insurance companies, one of the insurance companies (Fireman's Fund) could not establish appellate jurisdiction over an interlocutory appeal based on the contention that a Trigger Order for liability coverage affected a substantial right. The Trigger Order had no practical effect on Fireman's Fund's substantial rights because the trial court entered an order that Fireman's Fund owed no duty to plaintiff absent its consent. Additionally, Fireman's Fund did not show how application of the trigger order would impact any particular claim.

4. Appeal and Error—appealability—pretrial orders multiple liability insurers—asbestos and benzene—no certification—petition for certiorari denied

In a case involving the manufacturer of products containing benzene and asbestos and multiple liability insurance companies, it was noted that neither plaintiff-Radiator Safety Company (RSC) nor Fireman's Fund Insurance Company had attempted to obtain N.C.G.S. § 1A-1, Rule 54(b) certification of interlocutory orders, and those orders thus remained subject to change until entry of a final judgment. Moreover, petitions for certiorari by RSC and Fireman's Fund were denied. Significant non-collateral issues such as damages

remained disputed and it was unclear whether other claims had been resolved.

Appeal by plaintiff from orders entered 28 and 29 January 2016 by Judge W. David Lee in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 2017.

Perkins Coie LLP, by Jonathan G. Hardin, pro hac vice, and Catherine J. Del Prete, pro hac vice; and McGuireWoods LLP, by Joshua D. Davey and L.D. Simmons, II, for plaintiff-appellant, cross-appellee Radiator Specialty Company.

No brief filed for defendant-appellee Arrowood Indemnity Company.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and Timothy P. Lendino; and Rivkin Radler LLP, by Michael A. Kotula, pro hac vice, and Robert A. Maloney, pro hac vice, for defendant-appellee, cross-appellant Fireman's Fund Insurance Company.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Paul C. Lawrence; and Musick, Peeler, & Garrett, LLP, by Stephen M. Green, pro hac vice, for defendant-appellee Landmark American Insurance Company.

Goldberg Segalla, LLP, by David L. Brown; and Jacson & Campbell, P.C., by Donald C. Brown, Jr. and Timothy R. Dingilian, for defendant-appellee National Union Fire Insurance Company of Pittsburgh, PA.

Nexsen Pruet, PLLC, by James W. Bryan; and Saul Ewing, LLP, by Thomas S. Schaufelberger, pro hac vice, and Aaron J. Kornblith, pro hac vice, for defendant-appellee United National Insurance Company.

Gallivan, White & Boyd, P.A., by Phillip E. Reeves, pro hac vice, Jennifer E. Johnsen, pro hac vice, and Gillian S. Crowl; and Ellis & Winters LLP, by Thomas H. Segars, for defendant-appellee, cross-appellant Zurich American Insurance Company of Illionis.

Hunton & Williams LLP, by Nash E. Long; and Pillsbury Winthrop Shaw Pittman LLP, by Mark J. Plumer, pro hac vice, and Vernon

Thompson, Jr., pro hac vice, for Edison Electric Institute, amicus curiae.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Laura Foggan, pro hac vice, for Complex Insurance Claims Litigation Association, amicus curiae.

Robinson, Bradshaw & Hinson, P.A., by R. Steven DeGeorge; and Reed Smith LLP, by Ann V. Kramer, pro hac vice, and Julie L. Hammerman, pro hac vice, for United Policyholders, amicus curiae.

ELMORE, Judge.

The interlocutory appeals and cross-appeals in this complex insurance case arise from an action brought by a diversified products manufacturer and seller that, since 1971, secured from about two dozen insurers a sophisticated multi-policy commercial liability insurance package; for a few undisclosed years manufactured products containing benzene and asbestos and, consequently, has paid or incurred substantial litigation defense costs and liabilities to resolve hundreds of related products-liability claims; and then, years later, after settling coverage disputes with several of its insurers, brought the instant action against its remaining solvent insurers, seeking a judgment declaring the extent to which those insurers owe it a duty to pay its defense and indemnity costs under their respective policies for past and future benzene and asbestos claims brought against it.

Over the course of litigation, the parties moved and cross-moved for partial summary judgment on various coverage issues. After multiple hearings, the trial court entered fifteen orders resolving most disputes in the context of these progressive disease claims, including the proper theory to determine whether coverage has been triggered under a policy, method to allocate defense and indemnity costs for claims spanning multiple policy periods, and method to determine when underlying coverage exhausts and excess or umbrella coverage attaches. But before the court entered any final judgments in the action, the parties appealed or cross-appealed six of those orders.

This case presents various insurance liability coverage issues, including which trigger, allocation, and exhaustion theories or methods should apply to progressive disease claims spanning multiple policy periods of a decades-long, multi-carrier, multi-policy, multi-layered liability insurance coverage block. The dispositive issue, however, is

whether this case should dismissed at this stage in litigation. Several insurers request that we dismiss these appeals and cross-appeals so the trial court can enter a final judgment fully and finally resolving all claims. These insurers argue that the interlocutory orders on appeal would not irreparably affect substantial rights justifying immediate review. The insured and one insurer claim entitlement to immediate review on the basis that the orders affect their substantial rights.

Because these six interlocutory orders were not Rule-54(b)-certified by the trial court as appropriate for immediate appeal, nor has any party demonstrated sufficiently how any order affects its substantial rights and would work injury if not immediately reviewed, we dismiss these appeals and cross-appeals to allow the trial court to fully and finally resolve all matters before entertaining appellate review.

I. Background

Because thousands of documents in the appellate record and the parties' fifteen briefs were filed under seal, our discussion and analysis is limited.

Plaintiff Radiator Specialty Company (RSC) is an automotive, hardware, and plumbing products manufacturer and seller. Since 1971, RSC has insured itself against various risks from operating its business, securing from twenty-five insurers over one-hundred primary, excess, or umbrella commercial general and/or products liability insurance policies providing coverage for nearly annual periods in differing amounts, policies subject to differing limits, retentions, and deductibles. Five of those insurers, Fireman's Fund, Landmark, National Union, United National, and Zurich (defendants) issued RSC twenty-five primary, excess, or umbrella policies for nearly annual periods within a 1976–2014 coverage block.

For a few years within that coverage block, RSC manufactured products containing benzene and asbestos. As a result, RSC has been named as a defendant or co-defendant in hundreds of benzene- and asbestos-related products liability claims filed across the United States. Over several years, RSC has paid or incurred substantial litigation defense and liability costs to resolve hundreds of those claims and has entered into coverage settlements with many of its insurers.

In February 2013, RSC brought the instant action against its remaining fifteen solvent insurers, alleging they owed it a duty to indemnify RSC for its defense and liability costs and to reimburse RSC for its payment of those costs, and seeking a declaration of the rights, status, duties,

and obligations of those insurers under their respective policies to pay RSC's defense and indemnity costs for the benzene and asbestos claims. In July 2015, RSC amended its complaint and named nine insurers, including defendants, seeking declarations of those insurers' defense and indemnity duties for the benzene claims and declarations of six insurers' duties for the asbestos claims. RSC's amended complaint also added two claims against National Union for its alleged bad faith refusal to pay defense costs or settle claims, seeking punitive damages, and its alleged unfair and deceptive trade practices, seeking treble damages. RSC demanded a jury trial on all six of its claims for relief.

Throughout the litigation, the parties advanced several theories of insurance coverage and moved and cross-moved for partial summary judgment on several issues. First, the parties disputed the proper theory of triggering coverage under a policy with respect to these progressive disease claims. RSC and one insurer moved for application of an "injury-in-fact" trigger, a theory in which coverage for "bodily injury occurs when there is medical evidence establishing when the injury occurred, regardless of when it becomes diagnosable." *Imperial Cas. & Indem. Co. v. Radiator Specialty Co.*, 862 F. Supp. 1437, 1441 (E.D.N.C. 1994) (citations omitted), *aff'd*, 67 F.3d 534 (4th Cir. 1995). Other insurers moved for application of an "exposure" trigger, meaning coverage would only be triggered during periods in which claimants were actually exposed to benzene or asbestos.

Second, the parties disputed the proper method for allocating defense and indemnity costs when a covered claim spans multiple policy periods. RSC moved for application of an "all-sums" allocation, a method by which "a triggered insurer is liable for all costs associated with a claim, subject to a right of contribution among any other triggered insurers." The insurers moved for application of a "pro-rata" allocation, in which "costs are spread among the triggered insurers, and to the insured for uninsured periods, in a time-on-the-risk manner."

Third, the parties disputed the proper underlying-policy exhaustion method to trigger excess or umbrella coverage. Two umbrella insurers moved for application of "horizontal" exhaustion, meaning that the insured must exhaust all available underlying coverage before turning to excess or umbrella coverage. The competing position was "vertical" exhaustion, meaning that once an underlying policy exhausts, the coverage obligation shifts upward to the excess or umbrella policy covering the same policy period.

After five days of motions hearings on these and other coverage disputes, the trial court allegedly entered fifteen orders on 28 or

29 January 2016, although only eight are included in the appellate record. Relevant for this discussion are the six orders on appeal and their challenged rulings.

First, the court ruled that exposure trigger theory was the appropriate theory to determine when coverage under a policy was triggered ("Trigger Order"). Second, the court ruled that pro-rata allocation, based on a time-on-the-risk manner, was the proper method to allocate defense and indemnity costs for claims spanning multiple policy periods ("Allocation Order"). Third, the court ruled that horizontal exhaustion was the proper method to trigger excess or umbrella coverage, entering one order applicable to Zurich's umbrella policy ("Zurich Horizontal Exhaustion Order") and another applicable to Landmark's umbrella policies ("Landmark Partial Summary Judgment Order"). Next, the court ruled that RSC may not apply settlement payments and indemnity incurred without Zurich's consent to deduce the liability-retained limit of Zurich's umbrella policy, as required to trigger its indemnification obligations ("Zurich Indemnity Obligations Order"). Finally, the court ruled that RSC's coverage settlement with a primary insurer does not cease United National's coverage obligations under its excess policy ("United National Coverage Cessation Order").

On 26 February 2016, RSC appealed the Allocation Order, Trigger Order, Zurich Indemnity Obligations Order, Zurich Horizontal Exhaustion Order, and Landmark Partial Summary Judgment Order. That same day, Fireman's Fund appealed the Trigger Order, Landmark Partial Summary Judgment Order, and Zurich Horizontal Exhaustion Order. On 29 February 2016, United National appealed the Allocation Order and United National Coverage Cessation Order. That same day, Zurich cross-appealed the Zurich Horizontal Exhaustion Order.

II. Analysis

On appeal or cross-appeal, the parties challenge several of the trial court's rulings. In RSC's appeals, it contends the court erred in applying an exposure trigger, rather than an injury-in-fact trigger; a pro-rata allocation, rather than an all-sums allocation; and a horizontal exhaustion method, rather than a vertical exhaustion method, with respect to Landmark's umbrella coverage obligations. RCS also asserts the court erred by ruling it cannot apply settlement payments and indemnity incurred without Zurich's consent to erode the retained-liability limit of Zurich's umbrella policy. In Fireman's Fund's cross-appeal, it also challenges the trial court's application of an exposure trigger, rather than an injury-in-fact trigger. In United National's cross-appeal, it contends the

court erred by ruling that RSC's settlement with an underlying insurer does not terminate its coverage obligation for that policy period. In Zurich's cross-appeal, it contends the court erred by including a footnote to its Zurich Horizontal Exhaustion Order that, Zurich alleges, implies that its umbrella coverage obligations may attach in a situation other than complete horizontal exhaustion.

However, we must first consider the appealability of these interlocutory orders. Landmark, National Union, United National, and Zurich contend these interlocutory appeals and cross-appeals are premature and should be dismissed so the trial court can fully and finally resolve all matters before appellate review. These insurers argue the orders are interlocutory, do not affect substantial rights, and would not work injury if not reviewed before final judgment.

RSC and Fireman's Fund disagree. These parties argue we should immediately review their appeals. Fireman's Fund asserts that the orders constitute a final judgment for appeal purposes and, alternatively, that the Trigger Order affects substantial rights because it dictates which insurers owe RSC defense in pending claims. RSC asserts the Trigger Order, Allocation Order, Zurich Horizontal Exhaustion Order, and Landmark Partial Summary Judgment Order would irreparably affect its substantial rights absent immediate review because the orders eliminate or severely restrict its ability to obtain insurance defense in pending claims.

A. Orders are Interlocutory

[1] As an initial matter, we reject Fireman's Fund's argument that these series of partial summary judgment orders constitute a final judgment under N.C. Gen. Stat. § 7A-27(b)(1) (2015) (providing statutory right to appeal from final judgments of the superior court).

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. City of Durham, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950) (citations omitted).

Although RSC and its other insurers concede the orders are interlocutory, Fireman's Fund argues that, because the trial court "virtually

decided all the issues of law in dispute" and "left only collateral issues for determination," the orders, properly interpreted, constitute a final judgment for appeal purposes. Fireman's Fund cites to *Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013), in which our Supreme Court held that "[a]n order that completely decides the merits of an action . . . constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues *such as attorney's fees and costs*." *Id.* at 546, 742 S.E.2d at 801 (emphasis added) (citation omitted).

Here, conversely, notwithstanding RSC's pending attorney's fees request, other non-collateral issues remain unresolved. Significantly, although the orders resolve certain coverage disputes, the issue of damages remains pending. *See Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 492, 251 S.E.2d 443, 448 (1979) (dismissing as interlocutory "an order of partial summary judgment on the issue of liability, reserving for trial the issue of damages"); *see also Land v. Land*, 201 N.C. App. 672, 673, 687 S.E.2d 511, 513–14 (2010) ("Where defendants' liability for . . . damages has been established by jury verdicts, and the only unresolved issue before the trial court is the amount of damages to be awarded, [the] appeal is interlocutory, does not affect a substantial right, and must be dismissed."). Further, the record indicates RSC's two individual claims against National Union remain pending. Accordingly, because claims remain unresolved and matters still need to be judicially determined in the trial court, these orders are interlocutory.

B. Appellate Jurisdiction

Landmark, National Union, United National, and Zurich contend we lack jurisdiction over these appeals and cross-appeals because no order would irreparably affect substantial rights absent immediate appellate review. RSC and Fireman's Fund disagree and claim a right to immediate appeal on the basis that the orders affect substantial rights.

"[I]t is the duty of an appellate court to dismiss an appeal if there is no right to appeal." *Pasour v. Pierce*, 46 N.C. App. 636, 639, 265 S.E.2d 652, 653 (1980) (citing *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 201–02, 240 S.E.2d 338, 340 (1978)). "Generally, there is no right of immediate appeal from interlocutory orders." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). The purpose for this rule "is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Waters*, 294 N.C. at 207, 240 S.E.2d at 343.

Yet immediate appeal from an interlocutory order may be allowed in two situations. First, an appeal may lie in multi-claim or multi-party litigation, if the trial court certifies under Rule 54(b) of the North Carolina Rules of Civil Procure that its order represents a final judgment as to some claims or parties and that there is no just reason to delay the appeal. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015). Second, an appeal may lie if the order qualifies under N.C. Gen. Stat. §§ 1-277 and 7A-27(d)(1) (2015), typically because it affects a " 'substantial right which [the appellant] might lose if the order is not reviewed before final judgment.' " *Hanesbrands Inc. v. Fowler*, __ N.C. __, __, 794 S.E.2d 497, 499 (2016) (quoting *City of Raleigh v. Edwards*, 234 N.C. 528, 530, 67 S.E.2d 669, 671 (1951)).

Here, because no order is Rule 54(b)-certified as appropriate for immediate appeal, to establish appellate jurisdiction RSC and Fireman's Fund bear the burden of demonstrating how each order it appeals " '(1) affect[s] a substantial right and (2) [will] work injury if not corrected before final judgment.' " *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 569 (2007) (quoting *Goldston*, 326 N.C. at 728, 392 S.E.2d at 737); *see also Goldston*, 326 N.C. at 726, 392 S.E.2d at 736 ("[A]n appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment."). "It is the appellant's burden to present appropriate grounds for . . . acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" *Hanesbrands*, __ N.C. at __, 794 S.E.2d at 499 (quoting *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005)).

To satisfy this burden, RSC and Fireman's Fund must allege in the "statement of the grounds for appellate review" section of their briefs "sufficient facts and argument [establishing] that [a] challenged order affects a substantial right," N.C. R. App. P. 28(b)(4), and "must present more than a bare assertion that [an] order affects a substantial right; they must *demonstrate why* [an] order affects a substantial right," *Hanesbrands*, __ N.C. at __, 794 S.E.2d at 499 (quoting *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009) (first emphasis added)). " 'Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed.' " *Id.* at __, 794 S.E.2d at 499 (quoting *Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338).

1. RSC's Substantial Right Showing

[2] RSC alleges the orders affect its substantial right to "duty-to-defend coverage for currently pending lawsuits" because the orders "eliminat[e] or severely limit[ ] its ability to obtain a defense from its [i]nsurers in currently pending products liability suits." In the statement of the grounds for appellate review section of its principal brief, RSC makes a bare citation to our decision in *Cinoman v. Univ. of N. Carolina*, 234 N.C. App. 481, 764 S.E.2d 619, *disc. rev. denied*, __ N.C. __, 763 S.E.2d 383 (2014), and asserts: "Where, as here, there is a pending suit or claim, 'an interlocutory order concerning the issue of whether an insurer has a duty to defend in the underlying action "affects a substantial right that might be lost absent immediate appeal." ' " *Id.* at 483, 764 S.E.2d at 621–22 (quoting *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 4, 527 S.E.2d 328, 331 (2000)). Yet RSC neither applies nor analogizes the facts or procedural posture of *Cinoman* to its case and, therefore, fails to establish adequately that our finding of a substantial right in *Cinoman* controls here.

In *Cinoman*, the plaintiffs, Dr. Cinoman and his malpractice insurer, appealed from an interlocutory injunction order staying their declaratory judgment action brought on the issue of whether the defendant, UNC, owed defense and indemnity in a pending medical malpractice action. *Id.* at 482–83, 764 S.E.2d at 621. UNC had denied coverage and the patient demanded damages exceeding applicable malpractice insurance policy limits. *Id.* at 483, 764 S.E.2d at 621. The interlocutory injunction order on appeal stayed the plaintiff's declaratory judgment proceedings pending resolution the underlying malpractice action. *Id.* Accordingly, we concluded the order, which stayed an action brought on the issue of whether defense was owed in the underlying action, "concern[ed] the issue of whether an insurer has a duty to defend in the underlying action," and found a substantial right justifying immediate review. *Id.* at 483, 764 S.E.2d at 621–22.

Here, conversely, no order RSC appeals stays a declaratory judgment action brought on the issue of whether an insurer owes it defense in a particular claim pending resolution of that underlying claim. Nor do RSC's appeals arise from an action in which it alleges a particular insurer owes it defense in a particular claim. Rather, RSC's appeals arise from an action in which it seeks a declaration of the extent to which multiple insurers owe it a duty "to pay for defense costs and indemnity incurred" in hundreds of unidentified past claims and future claims brought against it. Further, RSC pointed this Court to no facts underlying any allegedly pending claim, such as whether, as in *Cinoman*, coverage has

been denied, or whether damages demanded would exceed reachable coverage limits. RSC's bare assertions that claims are pending against it and that these the orders concern the issue of whether an insurer owes defense in those claims, without further facts or argument, fails to demonstrate that our decision in *Cinoman* to find a substantial right controls its case.

In *Lambe*, we first acknowledged that an insured may be entitled to interlocutory review of an order "of partial summary judgment on the issue of whether [the insurer] has a duty to defend [the insured] in [an] underlying action," 137 N.C. App. at 4, 527 S.E.2d at 331, because "the duty to defend involves a substantial right to . . . the insured," *id.* (quoting *Gen. Accident Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St. 3d 17, 21–22, 540 N.E.2d 266, 271 (1989)). In recognizing this right, we explained that when an insurer denies coverage in a pending claim, "the insured often must choose to settle the suit as quickly as possible in order to avoid costly litigation, bring a declaratory judgment action against the insurer seeking a declaration that there is a duty to defend, or defend the suit without help from the insurer." *Id.* (quoting *Gen. Accident Ins. Co.*, 44 Ohio St. 3d at 21–22, 540 N.E.2d at 271).

Since *Lambe*, the duty-to-defend substantial right exception has been applied to permit an insured interlocutory review an order deciding the ultimate duty-to-defend issue when an identified claim is pending against it and the order arose from an action in which the insured alleged that it was owed defense in that claim. *See Enter. Leasing Co. v. Williams*, 177 N.C. App. 64, 67–68, 627 S.E.2d 495, 497–98 (2006) (finding the insured had substantial right where order declared, in part, its insurer owed "no duty to defend" in claim pending against it). This exception has also been applied to review an interlocutory order that stayed declaratory judgment proceedings brought on the ultimate duty-to-defend issue in a particular claim. *See Cinoman*, 234 N.C. App. at 483, 764 S.E.2d at 621–22. Heretofore, however, the duty-to-defend substantial right exception has never been applied to interlocutory orders that concern not the ultimate duty-to-defend issue with respect to a particular pending claim but resolve ancillary coverage disputes with respect to numerous unidentified claims, orders that merely may indirectly affect the duty-to-defend issue if applied to an allegedly pending claim. *See Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 319, 745 S.E.2d 69, 73 (2013) (finding no substantial right, in part, because, although order dismissed the insurer's affirmative defenses, it "did not address the ultimate issue of whether [the insurer] owed [the insured] a duty to defend and indemnify" in pending claim).

In this case, the orders RSC appeals decide the proper trigger theory and cost allocation method, as well as policy exhaustion method by which Landmark's and Zurich's umbrella coverage obligations attach, with respect to numerous unidentified claims. But no order directly decides or stays a decision on the ultimate duty-to-defend issue with respect to any particular claim. Although we are cognizant that certain orders may implicate the duty-to-defend issue to differing degrees depending upon the facts of an allegedly pending claim, RSC advanced no legal argument for expanding the duty-to-defend substantial right exception to orders that do not directly decide this ultimate issue. Additionally, unlike the appeals in *Enterprise Leasing Co.* and *Cinoman*, which arose from an allegation that an insurer owed defense in a particular pending claim, RSC's appeals arise from its allegation that multiple insurers owe it a "duty to pay for defense costs and indemnity incurred" in numerous unidentified claims. RSC advanced no argument for expanding this exception to appeals arising not from an allegation that an insurer owes defense in a particular pending claim but in hundreds of resolved, and a few allegedly pending, unidentified claims. Further, neither RSC shows adequately nor does the record indicate how delaying RSC's appeals until final judgment would force it to settle suits quickly, bring another declaratory judgment action, or leave it unable to mount an adequate defense in any claim. *See Lambe*, 137 N.C. App. at 4, 527 S.E.2d at 331. "[W]e take a restrictive view of the substantial right exception to the general rule prohibiting immediate appeals from interlocutory orders." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011) (citation, quotation marks, and brackets omitted).

Yet "[r]ecognizing that 'the "substantial right" test for appealability of interlocutory orders is more easily stated than applied,' . . . it is 'usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.' " *Hanesbrands*, __ N.C. at __, 794 S.E.2d at 500 (quoting *Waters*, 294 N.C. at 208, 240 S.E.2d at 343). Generally, "each interlocutory order must be analyzed to determine whether a substantial right is jeopardized by delaying the appeal." *Stetser v. TAP Pharm. Prod., Inc.*, 165 N.C. App. 1, 11, 598 S.E.2d 570, 578 (2004).

Here, the Trigger Order and Allocation Order decide the proper theory of triggering coverage and method of allocating defense and indemnity costs in hundreds of past and future claims brought against RSC. In the Zurich Indemnity Obligations Order, the court ruled that Zurich owes no duty to indemnify RSC until RSC demonstrates that it has exhausted the

liability-retained limit of Zurich's umbrella policy, which the court ruled RSC cannot erode by applying its indemnity costs paid or liabilities incurred without Zurich's consent. Zurich's policy provided $5 million in umbrella liability coverage per occurrence and in annual aggregate, with a $10,000.00 liability-retained limit per claim, for the 13 November 1982–13 November 1983 policy period. In the Landmark Partial Summary Judgment Order, the court ruled that the Landmark umbrella policies may afford RSC a duty to defend in a given benzene action where all applicable underlying policies have been exhausted by payments or settlements on RSC's behalf. These policies provided umbrella coverage in $10 million or $8 million per occurrence and annual aggregate amounts, with a $10,000.00 retained limit, for nearly annual policy periods spanning from 8 October 2003 to 1 May 2014.

RSC asserts in a footnote to its brief that, as of 31 October 2016, thirty-nine benzene claims remain pending against it, and argues the orders would work injury to its substantial right to insurance defense in those claims if not immediately reviewed because the Allocation Order "restricted the [i]nsurers' duty to defend RSC to a small fraction of its litigation costs under the guise of pro rata allocation"; the Trigger Order "reduced the number of policies available to defend RSC by applying the more restrictive 'exposure' trigger of coverage"; the Landmark Partial Summary Judgment Order "eliminated RSC's right to a defense from Landmark due to application of 'horizontal exhaustion' "; and the Zurich Horizontal Exhaustion Order "delayed RSC's right to a defense under Zurich's umbrella policy by barring RSC from properly counting settlements which did not require Zurich's consent toward exhausting underlying limits." Yet RSC never explained the practical impact applying any of these orders would have on its right to insurance defense in any allegedly pending claim.

RSC pointed this Court to no factual predicate underlying an allegedly pending benzene claim, nor did it identify any pending asbestos claims. *See Paradigm*, 228 N.C. App. at 319, 745 S.E.2d at 73 (finding no substantial right when underlying litigation had resolved). Additionally, the record reveals that the trial court entered an order declaring that three insurers owed RSC defense in benzene claims. These insurers issued RSC seven reachable policies providing primary liability coverage for certain annual periods within the 1981–1992 coverage block in differing amounts, subject to differing policy limits, deductibles, and retentions. In light of this order and RSC's failure to point us to any relevant facts in any allegedly pending claim—such as, whether insurers have denied coverage, the period in which claimants alleged exposure

to RSC's benzene-containing products or evidence indicates suffered an injury-in-fact, or the amount of damages demanded—this Court is unable to determine which policy periods may be implicated, which policies may be triggered, the extent to which RSC may be entitled to reachable primary coverage, or the extent to which excess or umbrella coverage might attach in any particular claim.

Because RSC failed to present sufficient facts and argument explaining the practical consequence of applying any order to any allegedly pending claim, especially in light of being entitled to some defense, this Court cannot meaningfully assess the extent to which any order may actually impact its right to defense in a pending claim or the extent to which any order may work injury if not immediately reviewed. Nor is it "the duty of this Court to construct arguments for or find support for an appellant's right to appeal; the appellant must provide sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 194, 767 S.E.2d 374, 376 (2014) (citing *Hamilton*, 212 N.C. App. at 79, 711 S.E.2d at 190). Because RSC has failed to demonstrate the applicability of its alleged substantial right exception to its particular case, we dismiss its appeals. *See Hanesbrands*, __ N.C. at __, 794 S.E.2d at 499 ("Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." (citation omitted)).

2. Fireman's Fund's Substantial Right Showing

[3] Fireman's Fund contends the Trigger Order affects substantial rights. It argues application of exposure trigger absolves certain insurers of their defense duties in pending claims, duties that may be triggered if injury-in-fact trigger were applied. Yet other than this bare assertion, Fireman's Fund advances no further showing of how applying exposure trigger would actually impact any particular claim. Although we recognize the Trigger Order may implicate different insurers' defense duties, as we concluded above, insufficient facts and arguments have been advanced for this Court meaningfully to assess the Trigger Order's practical effect on any allegedly pending claim.

National Union argues Fireman's Fund cannot establish appellate jurisdiction on the basis that the Trigger Order affects its substantial rights because the trial court entered an order declaring that Fireman's Fund owed RSC no duty to defend absent its consent. We agree.

In *Peterson v. Dillman*, __ N.C. App. __, 782 S.E.2d 362 (2016), we rejected a similar substantial right argument advanced by an automobile

insurer which attempted to appeal an interlocutory order that declared its policy covered a pending claim because, in light of an applicable statute, the order's practical effect was to permit but not require the insurer to defend in that pending claim. *Id.* at __, 782 S.E.2d at 367 ("We cannot agree with [the insurer] that its *choice* to enter the action is tantamount to a *duty* to defend an insured".). Here, the trial court entered an order declaring that Fireman's Fund owed RSC no defense duty absent Fireman's Fund's consent. As in *Peterson*, we conclude Fireman's Fund's ability but not duty to defend RSC does not implicate its substantial rights. Further, Fireman's Fund makes no showing as to how the Trigger Order would work injury to it if not reviewed before final judgment. *See Harris*, 361 N.C. at 270, 643 S.E.2d at 569 ("It is not determinative that the trial court's order affects a substantial right. The order must also work injury if not corrected before final judgment.").

Because applying the Trigger Order has no practical effect on Fireman's Fund's substantial rights, it cannot establish appellate jurisdiction on this basis. *See Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) ("[A]n interlocutory order affects a substantial right if the order 'deprive[s] the *appealing* party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered.' " (emphasis added) (quoting *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991)).

3. United National's and Zurich's Substantial Right Showing

United National and Zurich make no substantial right showing. These parties concede no order affects their substantial rights and contend that RSC's and Fireman's Fund's appeals and cross-appeals, as well as their own, should be dismissed at this stage in litigation. Because we dismiss RSC's and Fireman's Fund's appeals, we also dismiss United National's and Zurich's cross-appeals.

4. Other Avenues of Establishing Jurisdiction

[4] As a secondary matter, we note that RSC and Fireman's Fund could have attempted to establish appellate jurisdiction by obtaining a Rule 54(b)-certification on any of these interlocutory orders. *See Duncan*, 366 N.C. at 545, 742 S.E.2d at 801 ("Certification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties."). These parties either did not seek Rule 54(b)-certification or were unsuccessful in persuading the trial court to certify any of its orders as appropriate for immediate appellate review. Because these orders were not Rule 54(b)-certified, they are subject to change until entry of a final judgment.

N.C. Gen. Stat. § 1A-1, Rule 54(b) ("[I]n the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."); *see also Greene v. Charlotte Chem. Labs., Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961) ("[A]n [interlocutory] order . . . is subject to change by the court during the pendency of the action to meet the exigencies of the case.").

We also acknowledge that Fireman's Fund has filed a petition for writ of certiorari, which RSC has joined, requesting appellate review of any interlocutory order deemed unappealable. In our discretion, we deny the petition.

The general prohibition against entertaining interlocutory appeals exists "to eliminate the unnecessary delay and expense of repeated fragmentary appeals," *Edwards*, 234 N.C. at 529, 67 S.E.2d at 671, and to "permit[ ] the trial divisions to have done with a case fully and finally before it is presented to the appellate division," *Waters*, 294 N.C. at 207, 240 S.E.2d at 343. We reiterate that " '[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.' " *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568–69 (2007) (quoting *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382). At this stage in litigation, significant non-collateral issues such as damages remain disputed and pending and it is unclear from the record the extent to which other claims, including RSC's two individual claims against National Union, have been resolved. We conclude that "[t]his case should be reviewed, if at all, in its entirety and not piecemeal." *Tridyn Indus.*, 296 N.C. at 494, 251 S.E.2d at 449 (dismissing as untimely appeal from interlocutory order resolving issue of liability coverage but leaving unresolved issue of damages and denying the appellant's writ of certiorari as a means to otherwise establish appellate jurisdiction).

III. Conclusion

The six orders on appeal or cross-appeal are interlocutory. None were Rule 54(b)-certified by the trial court which entered them as appropriate for immediate appellate review. Nor has any party sufficiently demonstrated how any order affects its substantial rights and would work injury absent immediate review.

RSC failed to establish how the orders would irreparably affect its substantial right to insurance defense in allegedly pending benzene claims, especially in light of the particular facts and posture of its case. No order decides the ultimate duty-to-defend issue with respect to

any particular claim. RSC failed to advance a sufficient argument for expanding the duty-to-defend substantial right exception to any order that may have a secondary effect on this ultimate issue, which arose from an action brought not on any particular pending claim but on numerous unidentified claims. RSC failed to present sufficient facts underlying any allegedly pending benzene claim, is entitled to some defense for benzene claims, and failed to show how applying any order would practically impact its defense in any pending claim, especially in light of reachable primary coverage. Fireman's Fund cannot establish that the Trigger Order affects its substantial rights because it owes RSC no defense duty absent its consent. The remaining insurers argue these appeals and their own cross-appeals should be dismissed at this stage in litigation and we agree.

We dismiss these appeals and cross-appeals so that all issues may be fully and finally resolved before appellate review.

DISMISSED.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DEVRIE LERAN BURRIS, DEFENDANT

No. COA16-238

Filed 16 May 2017

1. Constitutional Law—federal—Miranda warnings—conversation not custodial—driver's license retained by officer

There was no error in an impaired driving prosecution where the trial court denied defendant's motions to suppress statements made without *Miranda* warnings. Although defendant argued that he was in custody after he handed the officer his driver's license, defendant was not under formal arrest and, under totality of the circumstances, an objectively reasonable person would not have believed that he restrained to that degree. The encounter occurred in a hotel parking lot, defendant was standing outside his vehicle while speaking with the officer, he was not handcuffed or told he was under arrest, and his movement was not limited beyond the officer retaining his driver's license.

2. Motor Vehicles—impaired driving—warrantless—exigent circumstances

There were exigent circumstances supporting a warrantless blood draw in an impaired driving prosecution where the trial court found that the officer had a reasonable belief that a delay would result in the dissipation of the alcohol in defendant's blood. The reading on the portable roadside breath test was .10; the officer believed that the reading was close to .08 after defendant was taken to the police department, refused the breathalyzer test, and made a telephone call; and the officer, who was the only officer at the scene, believed that it would have taken another hour and a half for another officer to arrive and to obtain a warrant.

3. Motor Vehicles—impaired driving—operating a motor vehicle —on a street, highway, or public vehicular area—sufficiency of the evidence

In an impaired driving prosecution arising from an encounter with an officer in a hotel parking lot, there was sufficient evidence for the jury to decide whether defendant had been driving the vehicle and whether he had driven it on a public highway, street, or public vehicular area. The officer had been called to the hotel because of robberies in the area, the engine of the vehicle was not running when the officer approached it, the vehicle was not in a parking space, defendant was sitting in the driver's seat, and defendant admitted that he had been driving the vehicle and described the route he had taken to the hotel in detail.

Appeal by defendant from judgment entered on or about 7 October 2015 by Judge Martin B. McGee in Superior Court, Cabarrus County. Heard in the Court of Appeals 22 August 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Whitney Dickinson-Schultz, for defendant-appellant.

STROUD, Judge.

Defendant Devrie Leran Burris ("defendant") appeals from the trial court's judgment finding him guilty of impaired driving. On appeal, defendant raises several issues, including that the trial court erred in denying his motion to suppress self-incriminating statements made

after his driver's license was retained and without *Miranda* warnings. Because we find that defendant was not in custody at the time his license was retained, we affirm the trial court's denial of his motion to suppress the statements. We also hold that the trial court properly denied defendant's motion to suppress the results of the warrantless blood draw due to exigent circumstances and that the court did not err in denying his motion to dismiss at the close of all the evidence.

Facts

On 13 April 2012, Christopher Hill of the Kannapolis Police Department ("Detective Hill") responded to a suspicious person call at a Fairfield Inn in Cabarrus County. After pulling in to the hotel parking lot, Detective Hill observed a red Ford Explorer "parked in front of the hotel kind of in the unloading area under the overhang." A woman was standing outside of the Explorer and defendant was sitting in the driver's seat. Detective Hill spoke to the woman standing outside of the car and to defendant through the passenger side window, which was rolled down. The vehicle's engine was not running.

Detective Hill asked "what they were doing there" and "for their identifications." Defendant and the woman responded that they were trying to get a room, and defendant got out of the driver's seat to walk around the car to Detective Hill to hand him his identification. Detective Hill noticed a "strong odor of alcohol beverage" from defendant when he handed over his driver's license. He told defendant and the woman to "hang tight there in the parking lot area" while he went inside to talk to the hotel clerk. He learned that the clerk had called because of a concern that the actions of defendant and the woman were similar to "a robbery that happened in a neighboring hotel a night or two before."[1]

Based on his conversation with the hotel clerk, Detective Hill went back outside to ask defendant if he was the one driving the vehicle, to which he responded "yes." He then began asking defendant questions about where he was traveling and the route he had taken to the hotel. At some point, Detective Hill checked the registration on the vehicle and determined that it was registered in defendant's name. Detective Hill asked defendant whether he had anything to drink that night, and defendant responded that he had "a couple drinks." Defendant told

1. Detective Hill did not say what the clerk told him, if anything, regarding the specifics of any "actions" of defendant or the woman which aroused his suspicions of a potential robbery. As relevant to the issues in this case, there is no evidence that the hotel clerk reported anything about when the Explorer arrived at the hotel or who had been driving it.

Detective Hill that he had not had anything to drink since arriving at the hotel. Detective Hill did not observe any open or unopened containers in or around the red Ford Explorer.

Detective Hill asked defendant "to submit to field sobriety testing," and performed those tests in the parking lot. Defendant "showed some signs of impairment on them." Detective Hill then asked defendant to submit to a portable breath sample test, and he obliged, resulting in a reading of .10. At that point, Detective Hill placed defendant under arrest for driving while impaired and transported him to the Kannapolis Police Department.

After arriving at the police station, Detective Hill attempted to perform a breath test on defendant, but he refused. Since defendant refused a breath test, Detective Hill took defendant to the hospital to request a blood draw for analysis. Detective Hill did not seek a warrant for the blood draw. After arriving at the hospital, Detective Hill informed defendant of his implied consent rights. Defendant exercised his right to contact a witness, but 30 minutes later, the witness still had not arrived. After defendant refused to submit to a blood draw, Detective Hill directed a nurse to draw blood samples from defendant's arm. After the blood draw, Detective Hill transported defendant to the magistrate's office, where he was processed and placed in jail.

Defendant was charged with impaired driving. He was convicted and sentenced in district court on 15 April 2014. Defendant appealed to the superior court. Defendant filed a motion to dismiss on 23 July 2015, and in the motion asked for suppression of

> any statements made by Defendant as the officer engaged in a custodial interrogation of the Defendant without advising the Defendant of his right to refrain from answering any questions or advising the Defendant of his constitutional right to counsel during questioning or any other federal, state or statutory rights of an accused in police custody regarding the effect of any statement on future proceedings.

On 17 August 2015, a hearing was held on defendant's motion and the trial court orally denied the motion to suppress statements in open court.

Following the 17 August 2015 hearing, the trial court entered an order and a subsequent amended order denying defendant's motion. In the amended order, the court concluded in relevant part:

2. Miranda warnings and a waiver of those rights apply only before officers begin a custodial interrogation. Miranda v. Arizona, 384 U.S. 436. Without facts showing both "custody" and "interrogation," the Miranda rule is inapplicable.

3. The U.S. Supreme Court has ruled that a person is in custody under the Miranda rule when officer [sic] have formally arrested the person or have restrained a person's movement to a degree associated with a formal arrest. Berkemer v. McCarty, 468 U.S. 420.

4. The North Carolina Supreme Court has made clear that it follows the U.S. Supreme Court on the meaning of custody. State v. Buchanan, 353 [N.C.] 332.

5. In the present case, the Defendant falls short of the test for custody, therefore the statements made before arrest should not be suppressed.

6. Under the totality of the above-referenced circumstances, the Defendant's Motion to Suppress should be denied.

An additional order denying defendant's motion to suppress was entered regarding the warrantless blood draw, finding "exigent circumstances to support a warrantless blood draw." A jury trial was held from 5 October to 7 October 2015, with the jury finding defendant guilty of driving while impaired. Defendant timely appealed to this Court.

Discussion

On appeal, defendant argues (1) that his motion to suppress self-incriminating statements should have been granted because he was seized and in custody at the time the statements were made yet he received no *Miranda* warnings; (2) that his motion to suppress the blood draw should have been granted because the warrantless blood draw was completed outside of any exigent circumstances; and (3) that the trial court erred in denying his motion to dismiss the charges because there was insufficient evidence to support a conviction.

I. Motion to Suppress Self-Incriminating Statements

[1] Defendant first argues on appeal that the trial court erred in denying his motion to suppress self-incriminating statements made without *Miranda* warnings. Specifically, defendant argues that he was seized and in custody when Detective Hill engaged in a "custodial interrogation"

and that he was "entitled to *Miranda* warnings before [Detective] Hill's ensuing questions."

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when. . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

Defendant does not frame his argument as a challenge to any particular findings of fact but rather simply argues that he should have received *Miranda* warnings after his license was retained and before Detective Hill asked questions, because he was seized and under custodial interrogation at that time. Defendant's argument does, however, direct us to a portion of the findings of fact as unsupported by the evidence, so we will briefly address those relevant findings.

The trial court found in part that:

> 4. Detective Hill asked the Defendant and the female for identification. The Defendant got out of the vehicle and gave identification to Detective Hill.
>
> 5. During this interaction, Detective Hill noticed that the Defendant had a strong odor of alcohol about his person *and the Defendant admitted to driving.*
>
> 6. Detective Hill directed both subjects to remain where they were while he went into the hotel to speak with the desk clerk. Detective Hill could not specifically recall, but believes he retained possession of the Defendant's identification (driver's license) when he left to enter the hotel.

(Emphasis added). Although the timing of events is not entirely clear from the wording of Finding No. 5, it could be understood to mean that defendant admitted to driving the vehicle *before* Detective Hill went

inside the hotel to speak to the clerk. If that was the intended meaning -- and it may not have been -- it is not supported by the evidence. Detective Hill's testimony at the suppression hearing sets forth the correct order of events. At the hearing, Detective Hill testified on direct examination by the State:

> Q And what did you observe once you arrived on the scene?
>
> A. When I pulled into the parking lot, I observed a red Ford Explorer. . . .
>
> Q What did you do at that point?
>
> A At that point I exited my patrol vehicle. I walked over to where the female was standing. I made contact with her, and the window was down in the passenger side so I was speaking to both her and the male and just asked what they were doing there and asked for their identifications.
>
> Q What was the nature of the conversation with the defendant?
>
> A At that point it was just when I asked what they were doing there, they said they were trying to get a room.
>
> Q And what happened next?
>
> A When I asked for the identifications . . . [defendant] got out of the driver seat of the vehicle and walked around to me and handed me his identification as well.
>
> . . . .
>
> Q Did you make any observations about him at that time?
>
> A At that time when he walked around to me and while we were just engaging in some short conversation, I detected a strong odor of alcoholic beverage coming from him.
>
> . . . .
>
> Q What did you do at that point?
>
> A At that point I just asked him to kind of hang tight there in the parking lot area while I went inside to speak with the hotel clerk. I went inside, spoke with her.

> Q And what did you do based on that conversation?
>
> A Based on that conversation, *I went back outside to speak to [defendant] and I asked him if he was the one who was driving the vehicle, and he responded to me yes.*

(Emphasis added). Detective Hill testified that it was not until after he went inside to speak to the hotel clerk and came back out that he asked defendant whether he had been driving. There is no evidence of any other order of events. Accordingly, we find that to the extent that Finding No. 5 could be understood as finding that Detective Hill asked defendant about driving *before* he took his driver's license and told him to "hang tight," the trial court's order contains findings that are not supported by competent evidence.

Nevertheless, the crux of defendant's argument on appeal deals with the trial court's conclusion that defendant "falls short of the test for custody[.]" In *Miranda v. Arizona*, the United States Supreme Court held that statements stemming from a custodial interrogation of the defendant may not be used unless the prosecution "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706, 86 S. Ct. 1602, 1612 (1966). Our Supreme Court has since clarified that "[t]he rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by police only applies to custodial interrogation." *State v. Brooks*, 337 N.C. 132, 143, 446 S.E.2d 579, 586 (1994). Additionally, "our Supreme Court has held the definitive inquiry in determining whether an individual is in custody for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *State v. Portillo*, __ N.C. App. __, __, 787 S.E.2d 822, 828, *appeal dismissed*, __ N.C. __, 792 S.E.2d 785 (2016) (citation, quotation marks, and brackets omitted).

Defendant argues that when Detective Hill retained his driver's license, he "was seized under the Fourth Amendment" and "was not 'free to leave[.]' " As such, defendant claims that "since [defendant] was seized, [Detective] Hill's ensuing questions constituted a custodial interrogation." Defendant's argument, however, erroneously conflates the *Miranda* standard for custody with seizure. Our Supreme Court clarified in *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001), that these two standards "are not synonymous[.]"

In *Buchanan*, the defendant argued "that the concept of 'restraint on freedom of movement of the degree associated with a formal arrest'

merely clarifies what is meant by a determination of whether a suspect was 'free to leave.' " *Id.* Our Supreme Court disagreed, explaining:

> The two standards are not synonymous, however, as is evidenced by the fact that the "free to leave" test has long been used for determining, under the Fourth Amendment, whether a person has been seized. Conversely, the indicia of formal arrest test has been consistently applied to Fifth Amendment custodial inquiries and requires circumstances which go beyond those supporting a finding of temporary seizure and create an objectively reasonable belief that one is actually or ostensibly "in custody." Circumstances supporting an objective showing that one is "in custody" might include a police officer standing guard at the door, locked doors or application of handcuffs.
>
> The trial court in the instant case mistakenly applied the broader "free to leave" test in determining whether defendant was "in custody" for the purposes of *Miranda*. We therefore remand the case to the trial court for a redetermination of whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest.
>
> The State contends this Court has been inconsistent in its application of the "ultimate inquiry" test versus the "free to leave" test. To the extent that [the cases cited] or other opinions of this Court or the Court of Appeals have stated or implied that the determination of whether a defendant is "in custody" for *Miranda* purposes is based on a standard other than the "ultimate inquiry" of whether there is a "formal arrest or restraint on freedom of movement of the degree associated with formal arrest," that language is disavowed.

Id. at 339-40, 543 S.E.2d at 828 (citations omitted). *See also Portillo*, __ N.C. App. at __, 787 S.E.2d at 828 ("This objective inquiry [for determining whether an individual is 'in custody' for *Miranda* purposes], labeled the 'indicia of formal arrest test,' is not synonymous with the 'free to leave test,' which courts use to determine whether a person has been seized for Fourth Amendment purposes. Instead, the indicia of formal arrest test has been consistently applied to Fifth Amendment custodial

inquiries and requires circumstances which go beyond those supporting a finding of temporary seizure and create an objectively reasonable belief that one is actually or ostensibly 'in custody.' " (Citations and quotation marks omitted)); *State v. Little*, 203 N.C. App. 684, 688, 692 S.E.2d 451, 456 (2010) ("[O]ur Supreme Court has rejected the 'free to leave' test for *Miranda* purposes and specifically overruled [prior cases] to the extent they appear to endorse that test. Instead, the ultimate inquiry on appellate review is whether there were indicia of formal arrest." (Citations omitted)).

In *Berkemer v. McCarty*, 468 U.S. 420, 442, 82 L. Ed. 2d 317, 336, 104 S. Ct. 3138, 3151-52 (1984), the U.S. Supreme Court ruled that the defendant was not taken into custody for *Miranda* purposes until the police officer formally arrested him and transported him in his patrol car to the county jail, so *Miranda* warnings were not required until his arrest. The U.S. Supreme Court concluded:

> [W]e find nothing in the record that indicates that respondent should have been given *Miranda* warnings at any point prior to the time Trooper Williams placed him under arrest. For the reasons indicated above, we reject the contention that the initial stop of respondent's car, by itself, rendered him "in custody." And respondent has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with formal arrest. Only a short period of time elapsed between the stop and the arrest. At no point during that interval was respondent informed that his detention would not be temporary. Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the subject's position would have understood his situation. Nor do other aspects of the interaction of Williams and respondent support the contention that respondent was exposed to "custodial interrogation" at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him to perform a simple balancing

> test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.

Id. at 441-42, 82 L. Ed. 2d. at 335-36, 104 S. Ct. at 3151. *See also State v. Rooks*, 196 N.C. App. 147, 153, 674 S.E.2d 738, 742 (2009) ("The fact that defendant held his head down, was not talkative, and was acting like he was in trouble might suggest he did not feel free to leave. However, the defendant's subjective belief has no bearing here. To hold otherwise would defeat the objective reasonable person standard. These facts and circumstances do not support a conclusion that defendant was subjected to custodial interrogation." (Citations and quotation marks omitted)); *State v. Benjami*n, 124 N.C. App. 734, 738, 478 S.E.2d 651, 653 (1996) ("[T]he fact that a defendant is not free to leave does not necessarily constitute custody for purposes of *Miranda*." (Citations and quotation marks omitted)).

As defendant was not under formal arrest at the time Detective Hill questioned him, we must determine whether, under the totality of the circumstances, defendant's movement was restrained to the degree associated with formal arrest. *Portillo*, __ N.C. App. at __, 787 S.E.2d at 828. "For purposes of *Miranda*, custody analysis must be holistic and contextual in nature: it is based on the totality of the circumstances and is necessarily dependent upon the unique facts surrounding each incriminating statement. No one factor is determinative." *Id.* at __, 787 S.E.2d at 828 (citations and quotation marks omitted). *See also State v. Crudup*, 157 N.C. App. 657, 660-61, 580 S.E.2d 21, 24-25 (2003) ("*Miranda* warnings are not required during normal investigative activities conducted prior to arrest, detention, or charge. In determining whether specific questions constitute custodial interrogation or general on-the-scene questioning, this Court has found the following factors to be relevant: (1) the nature of the interrogator; (2) the time and place of the interrogation; (3) the degree to which suspicion had been focused on the defendant, (4) the nature of the interrogation and (5) the extent to which defendant was restrained or free to leave. While none of the factors standing alone is determinative, each factor is relevant." (Citations omitted)).

Decided on a case-by-case basis, prior decisions of this Court indicate that the "functional equivalent" standard is quite onerous and not easily met, though it very much depends on the facts of a particular situation. *See, e.g.*, *State v. Barnes*, __ N.C. App. __, __, 789 S.E.2d 488, 491, *appeal dismissed*, __ N.C. __, 794 S.E.2d 525 (2016) ("Based on the totality of the circumstances, including the fact that Defendant was on

probation during the search of Mr. Lewis' residence, we conclude that Defendant was not subjected to a formal arrest or a restraint on his freedom of movement of the degree associated with formal arrest [even though handcuffed during search of the residence]. Therefore, we agree with the trial court that Defendant was not 'in custody' for purposes of *Miranda*."); *Portillo*, __ N.C. App. at __, 787 S.E.2d at 830 ("Whatever degree of suspicion the detectives may have conveyed through their questioning [of defendant in hospital after surgery for gunshot wounds], a reasonable person in defendant's position would not have been justified in believing he was the subject of a formal arrest or was restrained in his movement by police action."). *Cf. State v. Johnston*, 154 N.C. App. 500, 503, 572 S.E.2d 438, 441 (2002) ("After a careful review of the record, we conclude, as a matter of law, that defendant was in 'custody.' The record reveals that defendant was ordered out of his vehicle at gun point, handcuffed, placed in the back of a patrol car, and questioned by detectives. Although the officers informed defendant that he was in 'secure custody' rather than under arrest, we conclude that defendant's freedom of movement was restrained to the degree associated with a formal arrest. A reasonable person under these circumstances would believe that he was under arrest.").

Under the totality of the circumstances in this case, we agree with the trial court's conclusion that defendant "falls short of the test for custody," as he was not formally arrested and an objectively reasonable person in his position would not have felt that his movement was restrained to the degree associated with a formal arrest. *Portillo*, __ N.C. App. at __, 787 S.E.2d at 828. While defendant may not have felt free to leave -- and in fact may not have been free to leave -- the test for custody in relation to *Miranda* is not subjective. *See, e.g.*, *State v. Clark*, 211 N.C. App. 60, 68, 714 S.E.2d 754, 760 (2011) ("The extent to which Defendant was in custody for *Miranda* purposes depends on the objective circumstances surrounding his interactions with law enforcement officers, not on the subjective views harbored by Defendant." (Citation, quotation marks, ellipses, and brackets omitted)). Here, defendant was standing outside of his own vehicle while speaking with Detective Hill; he was not told he was under arrest or handcuffed, and other than his license being retained, his movement was not stopped or limited further while standing outside of the hotel by his vehicle. No mention of any possible suspicion of defendant's involvement in criminal activity -- driving while intoxicated or otherwise -- had yet been made, and an objectively reasonable person in these circumstances would not have believed he was under arrest or a functional equivalent at that time. Thus, although one of the trial court's findings was in error and not supported by the evidence, there

were still sufficient findings to support the trial court's conclusion of law that defendant was not "in custody" and subject to *Miranda* warnings at the time of his admission. Accordingly, we find no error.

II. Motion to Suppress Blood Test Evidence

[2] Next, defendant argues that the trial court erred in denying his motion to suppress the blood test evidence because Detective Hill obtained a warrantless blood draw outside of exigent circumstances. As stated above, our review of a denial of a motion to suppress is based on "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878.

Under N.C. Gen. Stat. § 20-139.1(d1) (2015):

> If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine.

"A reasonable belief generally must be based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing the point at issue." *State v. Fletcher*, 202 N.C. App. 107, 110, 688 S.E.2d 94, 96 (2010) (citation and quotation marks omitted).

In relation to the blood draw in this case, the trial court made the following relevant findings:

> 3. Detective Hill testified that when he arrived, the defendant was located in the driver's seat of his vehicle, the defendant had a strong odor of alcohol about his person, and the defendant admitted to driving.
>
> 4. Detective Hill testified that defendant "showed some signs of impairment" on the SFSTs and submitted a .10 reading on the roadside PBT.
>
> 5. Detective Hill testified that defendant admitted to having a couple of drinks, stated he had not drank

since arriving at the hotel, and stated that he had driven from Salisbury.

6. The defendant was arrested at 2:48 a.m.

7. Detective Hill arrived at the Kannapolis Police Department at 3:06 a.m. The defendant refused the intox within 2 to 3 minutes after arriving at the police department.

8. Detective Hill decided to get a blood test after the defendant refused the intox. CMC Kannapolis is approximately 4 miles away and is the closest place from Kannapolis Police Department for a blood draw.

9. At CMC Kannapolis, Detective Hill read the defendant his rights regarding the blood draw at 3:24 a.m. The defendant made a phone call. Detective Hill waited 30 minutes before starting the blood draw. The defendant refused the blood draw at 3:55 a.m. The defendant was compelled to submit shortly thereafter.

10. CMC Kannapolis is approximately 8 miles from the Magistrate's Office.

11. Detective Hill testified that based on the totality of the information he had at the time, he thought the defendant was close to a .08.

12. Detective Hill testified that it takes approximately 15 minutes to perform a blood draw.

13. Detective Hill testified that he believed it would have taken [an] additional hour to an hour and a half to get a search warrant, which would include driving to and from the Magistrate's Office, filling out the search warrant, presenting the information to the magistrate, and waiting for the warrant to be issued. Detective Hill further indicated that his best estimate of delay would have been an hour and 20 minutes, but it could be longer if there were other officers ahead of him.

14. Detective Hill testified there typically would be one magistrate at that time. There was no information offered if there would have been other officers available to assist in holding the defendant if Detective Hill went to get a search warrant.

15. Based on the information before the court, Detective Hill was the only officer on the scene that night.

16. Detective Hill did not contact the Magistrate's Office to determine if there would have been a wait if he applied for a search warrant.

17. The Court finds Detective Hill's testimony credible.

The trial court concluded in relevant part:

8. There were exigent circumstances to support a warrantless blood draw.

9. In the present case, without getting a warrant, the process for getting the defendant's blood took approximately one hour and 22 minutes from the time the officer made contact with the defendant, 2:33 a.m., until the blood draw began, shortly after 3:55 a.m. There was no evidence before the court that the time this took was anything but routine and was within the officer's expectations.

10. The officer testified that it would take an additional hour to an hour and a half to obtain a search warrant under the circumstances of this case. His testimony was credible. When added to the reasonable and predictable time it took to draw the blood without a warrant, an hour and 22 minutes, the time it would have taken with a warrant increases to two hours and 22 minutes to two hours and 52 minutes.

11. The officer in this case had a .10 roadside reading and alcohol "decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed." McNeely. After considering these facts as well as the other factors outlined above, the court finds that the officer had exigent circumstances to have the blood drawn without a warrant. This is also consistent with the two to three hour window found in State v. Fletcher to dispense with the need for a warrant as this case falls in the two hour and 22 minutes to two hours and 52 minutes range with the facts listed above.

12. Under the totality of the above referenced circumstances, the defendant's motion to suppress should be denied.

As defendant does not challenge any particular findings on appeal, the trial court's findings are considered binding on appeal. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 ("[W]hen, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal."). Rather, defendant argues that the trial court erred in denying his suppression motion because Detective Hill compelled that his blood be drawn without sufficient exigent circumstances to support the warrantless blood draw.

The United States Supreme Court held in *Schmerber v. California*, 384 U.S. 757, 768, 16 L. Ed. 2d 908, 918, 86 S. Ct. 1826, 1834 (1966) that the Fourth Amendment prohibits the warrantless seizure of a blood sample where such intrusion is "not justified in the circumstances" or is made in an "improper manner." More recently, in *Missouri v. McNeely*, __ U.S. __, __ 185 L. Ed. 2d 696, 715, 133 S. Ct. 1552, 1568 (2013), the Supreme Court held, in the context of a blood draw performed over a defendant's objection in impaired driving cases, that the dissipation of alcohol in a person's blood stream standing alone "does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."

This Court addressed *McNeely* in *State v. Dahlquist*, 231 N.C. App. 100, 103, 752 S.E.2d 665, 667 (2013), *appeal dismissed and disc. review denied*, 367 N.C. 331, 755 S.E.2d 614 (2014), noting that "after the Supreme Court's decision in *McNeely*, the question for this Court remains whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search." In *Dahlquist*, the trial court found that: (1) the defendant pulled up to a checkpoint and an officer noticed an odor of alcohol; (2) the defendant admitted to drinking five beers; (3) field sobriety tests indicated that the defendant was impaired; and (4) the officer went to the hospital directly because he knew that it was 10 to 15 minutes away and typically not too busy on Saturday mornings, but that on a weekend night "it would take between four and five hours to obtain a blood sample if he first had to travel to the Intake Center at the jail to obtain a warrant." *Id.* at 103, 752 S.E.2d at 665. This Court evaluated the totality of the circumstances and held that "the facts of this case gave rise to an exigency sufficient to justify a warrantless search." *Id.* at 104, 752 S.E.2d at 668.

In *Fletcher*, decided prior to *McNeely* and *Dahlquist*, this Court held "that competent evidence supports the findings of fact that Officer

Powers reasonably believed that a delay would result in the dissipation of the alcohol in defendant's blood and that exigent circumstances existed that allowed a warrantless blood draw." *Fletcher*, 202 N.C. App. at 113, 688 S.E.2d at 98. This Court explained in *Fletcher* that the defendant

> [did] not question whether he had refused to submit to a test or whether probable cause existed in order to compel a blood test. Therefore, the only issue is whether Officer Powers's belief was reasonable under the circumstances. Defendant contends that Officer Powers's belief -- that the delay caused by obtaining a court order would result in the dissipation of defendant's percentage of blood alcohol -- was unreasonable and not grounded in fact or knowledge. However, competent evidence exists to suggest that her belief was reasonable. Officer Powers testified that the magistrate's office in Carthage was twelve miles away. She also testified that she had been to the magistrate's office on approximately twenty to thirty occasions late on Saturday night or early Sunday morning. She testified that the weekends are often very busy at the magistrate's office and that, of the twenty to thirty weekend nights she had traveled there, she had had to stand in line several of those times. Officer Powers further testified that she frequently had been to the emergency room at the hospital on weekend nights and that most of the time it was busy then. Based upon her four years' experience as a police officer, Officer Powers opined that the entire process of driving to the magistrate's office, standing in line, filling out the required forms, returning to the hospital, and having defendant's blood drawn would have taken anywhere from two to three hours. Although other evidence exists that could have supported a contrary finding, we hold that the trial court's finding of fact as to Officer Powers's reasonable belief is supported by competent evidence.

Id. at 110-11, 688 S.E.2d at 96 (quotation marks and brackets omitted). In addition, this Court held that "the trial court had before it competent evidence to support its finding that exigent circumstances existed" where the defendant "had failed multiple field sobriety tests and was unsuccessful at producing a valid breath sample[,]" and the officer "testified as to the distance between the police station and the magistrate's office, her belief that the magistrate's office would be busy late on a Saturday night, and her previous experience with both the

magistrate's office and the hospital on weekend nights." *Id.* at 111, 688 S.E.2d at 97.

More recently, in *State v. Granger*, 235 N.C. App. 157, 165, 761 S.E.2d 923, 928 (2014), this Court affirmed the trial court's denial of a motion to suppress where "the totality of the circumstances showed that exigent circumstances justified the warrantless blood draw." (Emphasis omitted).

> Specifically, the trial court found that Officer Lippert had concerns regarding the dissipation of alcohol from Defendant's blood, as it had been over an hour since the accident when Officer Lippert established sufficient probable cause to make his request for Defendant's blood. Those findings also state Officer Lippert's concerns due to delays from the warrant application process. Its findings show that Officer Lippert did not have the opportunity to investigate the matter adequately until he arrived at the hospital because of Defendant's injuries and need for medical care. Even if he had the opportunity to investigate the matter at the accident scene sufficiently to establish probable cause, unlike [the situation in *McNeely*], Officer Lippert was investigating the matter by himself and would have had to call and wait for another officer to arrive before he could travel to the magistrate to obtain a search warrant. Its findings show that Officer Lippert's knowledge of the approximate probable wait time and time needed to travel, as being over a 40 minute round trip to the magistrate at the county jail. Additionally, Officer Lippert had the added concern of the administration of pain medication to Defendant. Defendant had been in an accident severe enough that he was placed on a backboard for transportation to the hospital and complained of pain in several parts of his body. There was a reasonable chance if Officer Lippert left him unattended to get a search warrant or waited any longer for the blood draw, Defendant would have been administered pain medication by hospital staff as part of his treatment, contaminating his blood sample.

Id. (citations, quotation marks, brackets, and footnote omitted). *Cf. State v. Romano*, __ N.C. App. __, __, 785 S.E.2d 168, 174, *temp. stay allowed*, __ N.C. __, 789 S.E.2d 438, *disc. review allowed*, __ N.C. __, 794 S.E.2d 315, and __ N.C. __, 794 S.E.2d 317 (2016) ("Under the totality of the circumstances, considering the alleged exigencies of the

situation [where the defendant was unconscious and unable to receive and consider his blood test rights and magistrate's office was a couple miles away from the hospital], the warrantless blood draw was not objectively reasonable.")[2].

The United States Supreme Court addressed warrantless breath tests and blood draws even more recently in *Birchfield v. North Dakota*, __ U.S. __, 195 L. Ed. 2d 560, 136 S. Ct. 2160 (2016). In *Birchfield*, the Supreme Court held that a warrantless breath test of an impaired-driving suspect is permissible under the Fourth Amendment as a search incident to arrest, but a warrantless blood draw is not permissible as a search incident to arrest due to its nature of being a greater intrusion of privacy. *Id.* at __, 195 L. Ed. 2d. at 588, 136 S. Ct. at 2185 ("Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.").

Here, however, defendant's only argument on appeal in relation to the blood draw is that it was "outside of exigent circumstances[,]" so *Birchfield* does not change the analysis. *See id.* at __, 195 L. Ed. 2d. at 587, 136 S. Ct. at 2184 ("Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not."). Furthermore, under the totality of the circumstances in this case, "the evidence supports the trial court's findings and conclusions regarding the existence of exigent circumstances[.]" *Dahlquist*, 231 N.C. App. at 104, 752 S.E.2d at 668.

Defendant submitted a .10 reading on a roadside PBT and was subsequently arrested at 2:48 a.m. before being transported to the Kannapolis Police Department, where he arrived 18 minutes later. Defendant "refused the intox within 2 to 3 minutes after arriving at the police department[,]" so Detective Hill made the decision to compel a blood test. The closest hospital was approximately four miles away from the police department and eight miles away from the Magistrate's Office. Detective Hill read defendant his rights as related to the blood draw at the hospital at 3:24 a.m. and waited for defendant to finish making a phone call before starting the blood draw at 3:55 a.m. The trial court

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2. Our Supreme Court granted a temporary stay in this matter on 24 May 2016, *State v. Romano*, __ N.C. __, 789 S.E.2d 438 (2016), and recently heard arguments on 20 March 2017.

also found that "Detective Hill testified that based on the totality of the information he had at the time, he thought the defendant was close to a .08." Additionally, Detective Hill indicated that it was his belief that it would have taken an additional hour to an hour and a half to get a search warrant and he was the only officer on the scene, as in *Granger*, where the officer "was investigating the matter by himself and would have had to call and wait for another officer to arrive before he could travel to the magistrate to obtain a search warrant." *Granger*, 235 N.C. App. at 165, 761 S.E.2d at 928.

As in *Fletcher*, "[a]lthough other evidence exists that could have supported a contrary finding," 202 N.C. App. at 111, 688 S.E.2d at 96, we conclude that the trial court's findings -- as to Detective Hill's reasonable belief that a delay would result in the dissipation of the alcohol in defendant's blood -- are supported by competent evidence. As the findings are supported by competent evidence, and the findings support the trial court's ultimate conclusion that the blood draw was constitutional, we hold that the trial court did not err in denying defendant's motion to suppress the blood draw.

III. Motion to Dismiss

[3] Finally, defendant argues that the trial court erred in denying his motion to dismiss the impaired driving charge at the close of the State's evidence and at the close of all evidence because the State failed to present substantial independent circumstantial or direct evidence -- other than defendant's statement -- to establish that defendant was operating a motor vehicle at any relevant time.

> This Court reviews the trial court's denial of a motion to dismiss *de novo*. Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.

State v. Marley, 227 N.C. App. 613, 614-15, 742 S.E.2d 634, 635-36 (2013) (citations and quotation marks omitted). *See also State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002) ("Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion."); *State v. Franklin*, 327 N.C. 162, 171-72, 393 S.E.2d 781, 787 (1990) ("The trial court need only satisfy itself that the evidence is sufficient to take the case to the jury; it need not be concerned with the weight of that evidence. If there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of defendant's guilt." (Citations omitted)).

Under N.C. Gen. Stat. § 20-138.1 (2015), a person commits the crime of driving while impaired

> if he drives any vehicle upon any highway, any street, or any public vehicular area within the State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
>
> (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. Ann. § 20-138.1(a). Here, defendant argues that "the [S]tate has failed to present evidence of the substantial elements of 'driving' and 'on a highway, street, or public vehicular area' for the charged offense of driving while impaired."

This Court has previously found that "one 'drives' within the meaning of [N.C. Gen. Stat. § 20-138.1] if he is in actual physical control of a vehicle which is in motion or which has the engine running." *State v. Fields*, 77 N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985). In this case, defendant admitted to Detective Hill that he had been driving the vehicle, and as discussed above, his statement was admissible evidence. He also described in detail the route he took to get to the hotel. Defendant told Detective Hill that he had driven from Salisbury on Interstate 85. Specifically, Detective Hill explained:

> Then I asked if he got off the exit on the Interstate at Highway 29. We were close to Exit 58 off 85. I asked if he got off at that Exit, and he said yes. And then he pointed to the IHOP, which is at the intersection of 29 and Cloverleaf Plaza. When I asked him where he turned, he pointed there. And then I pointed to Cloverleaf Parkway, which is the road/street running right in front of the hotel, asked if he drove down that portion of the road and he said yes.

Although Detective Hill testified that the vehicle's engine was not running at the time he approached the vehicle, it was parked under the overhang area by the front door of the hotel, where guests typically stop to check in to the hotel, not in a parking spot. He also observed defendant sitting in the driver's seat, and defendant got out of the driver's seat to give Detective Hill his driver's license. The vehicle was registered to defendant. The circumstantial evidence, along with defendant's admissions to driving the vehicle and the route he took, was sufficient evidence for the jury to decide whether defendant drove the vehicle and whether he drove it on a highway, street, or public vehicular area at a relevant time. Thus, "[u]nder the proper standard of review, substantial evidence existed for each essential element of DWI. Viewing the evidence in a light most favorable to the State, we conclude that a reasonable inference of defendant's guilt may be drawn from the direct and circumstantial evidence presented by the State. Such evidence was sufficient to support the jury's verdict of guilty." *Scott*, 356 N.C. at 598, 573 S.E.2d at 870.

Conclusion

Accordingly, we hold that the trial court did not err by denying defendant's motions to suppress his statement, by denying his motion to suppress the results of the warrantless blood test, or by denying his motion to dismiss for insufficient evidence.

NO ERROR.

Chief Judge McGEE and Judge INMAN concur.

STATE OF NORTH CAROLINA
v.
MELVIN LEROY FOWLER, DEFENDANT

No. COA16-947

Filed 16 May 2017

Constitutional Law—North Carolina—unanimous instructions—disjunctive instructions—prejudicial error

There was prejudicial error in an impaired driving prosecution where the trial court erred by instructing the jury on both driving under the influence and driving with an alcohol concentration of .08 or more, even though there was no evidence of a specific blood alcohol level. There was prejudicial error in that it was impossible to determine the charge on which offense the jury based its verdict. This is not a case where there was overwhelming evidence of impaired driving.

Judge BERGER concurring.

Appeal by Defendant from judgment entered 2 March 2016 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 8 March 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Melvin Leroy Fowler ("Defendant") appeals a jury verdict convicting him of driving while impaired ("DWI"). On appeal, Defendant contends the trial court erred by: (1) instructing the jury on a theory of impaired driving unsupported by the evidence, thus violating Defendant's constitutional right to a unanimous jury verdict; and (2) allowing Officer Monroe to testify as an expert witness regarding the horizontal gaze Nystagmus ("HGN") test. For the following reasons, we grant Defendant a new trial.

I. Factual and Procedural Background

On 19 June 2014, Officer R. P. Monroe of the Raleigh Police Department ("RPD") stopped Defendant and arrested him for DWI. On

24 February 2015, Wake County District Court Judge James R. Fullwood found Defendant guilty of DWI. Defendant appealed to superior court for a jury trial, pursuant to N.C. Gen. Stat. § 15A-1431 (2016).

On 1 March 2016, the trial court called Defendant's case for trial. The evidence at trial tended to show the following.

The State first called Officer Monroe. On Thursday, 19 July 2014, Officer Monroe worked the night shift for the RPD. Aware the Wake County Sheriff's Office set up a checkpoint on Gorman Street, Officer Monroe visited the checkpoint to see if he could assist.

Officer Monroe rode down Avent Ferry Road on his motorcycle. When he was less than a half a mile from Gorman Street, he came to a point where Crest Road T-intersects with Avent Ferry Road. Officer Monroe saw Defendant's truck on Crest Road. Defendant pulled out in front of Officer Monroe's motorcycle. Officer Monroe "lock[ed] the bike up"[1], "ma[d]e an evasive maneuver", and "dip[ped]" into the right lane to avoid hitting Defendant's truck. Officer Monroe's motorcycle and Defendant's truck came within "maybe two or three feet" of each other. Officer Monroe activated his blue lights and stopped Defendant for unsafe movement. Defendant stopped his truck at a stop sign at the intersection of Avent Ferry Road and Champion Court.

Officer Monroe introduced himself and explained he stopped Defendant because Defendant almost ran into his motorcycle. Officer Monroe saw Defendant's red, glassy eyes. He smelled a "medium" odor of alcohol on Defendant's breath. Defendant spoke with slurred speech. Officer Monroe asked Defendant why he pulled out in front of his motorcycle. Defendant remarked Officer Monroe had enough room and he "was catching [Officer Monroe's] curiosity."

Officer Monroe asked Defendant if he drank any alcohol that night. Defendant responded "one to two" servings of Jägermeister, and he was only driving a short distance. Officer Monroe asked Defendant to get out of his truck to participate in a series of field sobriety tests. Defendant agreed.

Officer Monroe conducted three field sobriety tests: HGN, walk-and-turn, and one-leg stand. Officer Monroe first conducted the HGN test. Officer Monroe turned Defendant away from traffic, so passing

1. Officer Monroe explained to "lock the brakes up" means to employ the antilock brake on the motorcycle.

headlights did not affect Defendant's eyes. He directed Defendant to stand facing him, with his feet together and hands to the side. Officer Monroe elevated Defendant's head slightly and held his finger in front of Defendant. He informed Defendant he was going to move his finger from left to right and instructed Defendant to follow his finger with Defendant's eyes. Defendant stated he understood the instructions, and Officer Monroe started the test. During the test, Defendant displayed a lack of "smooth pursuit" in both eyes, which Officer Monroe considered "two clues." Defendant ultimately displayed six out of six possible clues, three in each eye. Based on this test and the odor of alcohol, Officer Monroe concluded Defendant "had an impairing amount of alcohol in his system."

Officer Monroe also conducted two "divided attention" tests. The first test is the walk-and-turn. Officer Monroe instructed Defendant to place his left foot in front, with both hands to his sides, and move his right foot heel-to-toe. Officer Monroe told Defendant to stay in the heel-to-toe position while he gave Defendant further instructions. Officer Monroe next instructed Defendant to take nine heel-to-toe steps while keeping his hands at his sides, and counting out loud.

Defendant failed to follow instructions. Defendant swayed and stepped out of the starting stance. Officer Monroe instructed Defendant to return to the starting stance. Defendant then started the test too soon, stepped out of position, and lost his balance. Officer Monroe again instructed Defendant to stand in the starting position, but Defendant stepped out. The third time Officer Monroe instructed Defendant to get back in starting position, Defendant told Officer Monroe he could not do the test. Defendant then told Officer Monroe he was not going to do the test without his kneepads. Officer Monroe concluded the test.

Officer Monroe asked Defendant if he was willing to do the one-leg stand test. Defendant agreed. Officer Monroe instructed Defendant to keep his feet together, put his hands to his side, and stay in that position. Defendant was then to lift one foot with his toes pointed to the ground, and keep his foot parallel with the ground. While looking at his foot, Defendant would count to three. Next, Defendant should put his foot down and repeat the lift, as he continued counting from where he left off.

Defendant swayed when Officer Monroe started the test. Defendant also failed to follow the instructions. Defendant "barely got his foot off the ground" and failed to look down at his toes. When Officer Monroe instructed Defendant to lift his foot six inches off the ground, Defendant told Officer Monroe he did not know how much six inches was. Officer

Monroe offered to demonstrate the test again. Defendant said he no longer wanted to do the test.

Officer Monroe told Defendant he would like to take a preliminary sample of Defendant's breath. He explained this test was not admissible in court, but rather just a test for positive or negative of alcohol. Defendant refused.

Officer Monroe arrested Defendant for DWI. After booking Defendant, Officer Monroe brought Defendant into the DWI testing room. He presented Defendant with a form for implied consent. Officer Monroe read Defendant his rights. Defendant signed the form, acknowledging he understood his rights. Defendant then placed a call. Officer Monroe did not know if Defendant called someone to observe the administration of tests.

Thirty minutes later, Officer Monroe administered the Intoxilyzer test. Officer Monroe instructed Defendant on how to correctly blow into the breathalyzer. However, Defendant stopped blowing air into the instrument before Officer Monroe told him to stop. The instrument "shut[] down" and displayed "insufficient sample." Officer Monroe again instructed Defendant on how to correctly blow into the instrument. Defendant said he had cancer, which prevented him from properly blowing into the instrument. Defendant then told Officer Monroe he was not going to blow into the instrument. Officer Monroe explained to Defendant his breathing was sufficient, but Defendant prematurely stopped blowing. Officer Monroe told Defendant if Defendant did not blow into the instrument, he was "going to refuse him." "Refusing" constitutes pressing the refusal button on the instrument, which indicates Defendant's "willful refusal not to provide a breath sample on the instrument for the purposes of a DWI investigation."

The State rested, and Defendant moved to dismiss the case. The trial court denied Defendant's motion to dismiss. Defendant did not present any evidence. Defendant renewed his motion to dismiss, and the trial court denied Defendant's motion.

When discussing jury instructions, the State requested "the .08 instruction." Defendant objected to the .08 instruction, because "there was no evidence to [any] sort of an actual number of any blood alcohol level . . . ." The trial court decided it would use the .08 instruction and reasoned:

> Well, if you argue they haven't shown .08 I'm going to give that instruction or they haven't shown his blood alcohol content I will give that instruction because you can't have

> it both ways. You can't -- you can't object to the instruction and argue that they haven't shown his [blood alcohol content] because there [is] more than one way to prove the offense.

The jury found Defendant guilty of driving while impaired. Defendant admitted to the existence of two driving while impaired convictions. Defendant admitted to the aggravating fact of driving while license revoked due to a DWI conviction. The trial court sentenced Defendant as an Aggravated Level One offender and sentenced him to 24 months imprisonment. Defendant gave timely oral notice of appeal.

II. Standard of Review

Challenges to the trial court's "decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). In a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008)(internal quotation marks and citation omitted).

"It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citations omitted). If an error is preserved for review, but does not arise under the Constitution of the United States, we review for prejudicial error. N.C. Gen. Stat. § 15A-1443(a) (2016).

Lastly, in regards to Officer Monroe's expert opinion testimony, the trial court's ruling on expert testimony under Rule 702 is typically reviewed for abuse of discretion. *State v. McGrady*, 368 N.C. 880, ___, 787 S.E.2d 1, 11 (2016) (citation omitted). "And 'a trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *Id.* at ___, 787 S.E.2d at 11 (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). However, "[w]here the [defendant] contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *State v. Torrence*, ___ N.C. App. ___, ___, 786 S.E.2d 40, 41 (2016) (quotation marks and citations omitted).

III. Analysis

We review Defendant's contentions in two parts: (A) jury instructions for impaired driving under N.C. Gen. Stat. § 20-138.1 (a)(2); and (B) Officer Monroe's expert testimony regarding the HGN test.

A. Jury Instructions for Impaired Driving

On appeal, Defendant contends the trial court erred by instructing the jury on driving while impaired under N.C. Gen. Stat. § 20-138.1 (a)(2), which violated Defendant's constitutional right to an unanimous jury verdict. We address Defendant's contentions regarding the jury instructions together and agree the trial court committed reversible error.

N.C. Gen. Stat. § 20-138.1(a) states:,

A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed a sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
>
> (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 138.1(a).

"Both the North Carolina Constitution and the North Carolina General Statutes protect the right of the accused to be convicted only by a unanimous jury in open court." *State v. Walters*, 368 N.C. 749, ___, 782 S.E.2d 505, 507 (2016) (citing N.C. Const. art. I, § 24; N.C. Gen. Stat. § 15A-1237(b)). "But it does not follow from these constitutional and statutory guarantees that every disjunctive jury instruction violates one or both of those guarantees." *Id.* at ___, 782 S.E.2d at 507.

As explained by our Supreme Court:

> a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, either which is in itself a separate offense, is fatally

> ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.
>
> …
>
> [I]f the trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied.

Id. at ___, 782 S.E.2d at 507-08 (internal quotation marks, citations, and emphases omitted).

This Court recently stated:

> North Carolina's appellate courts have consistently held that "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted). That is because the purpose of jury instructions is "the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *Id.* An instruction related to a theory not supported by the evidence confuses the issues, introduces an extraneous matter, and does not declare the law applicable to the evidence.

State v. Malachi, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, COA16-752, 2017 WL 1381592, *2 (2017).

Typically, disjunctive jury instructions for impaired driving are permissible. *State v. Oliver*, 343 N.C. 202, 215, 470 S.E.2d 16, 24 (1996). When a disjunctive jury instruction is permitted, the State must still present evidence to support both theories. *State v. Johnson*, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007). When a disjunctive jury instruction is improperly given, it violates the Defendant's right to a unanimous jury, because it is impossible to determine upon what theory of the case the jury decided. *State v. Funchess*, 141 N.C. App. 302, 308, 540 S.E.2d 435, 438-39 (2000) (citations omitted).

Here, the State specifically requested the .08 instruction "just so [counsel could] use it in [his] argument." Defendant objected because "there was no evidence to sort of an actual number of any blood alcohol level . . . ." The trial court overruled Defendant's objection and instructed the jury as follows, *inter alia*:

The defendant has been charged with impaired driving. For you to find the defendant guilty of this offense the state must prove three things beyond a reasonable doubt:

First, that the defendant was driving a vehicle.

Second, that the defendant was driving that vehicle upon a highway or street within the state.

And third, that the defendant was driving that vehicle, (1) that the defendant was under the influence of an impairing substance. Alcohol is an impairing substance. The defendant is under the influence of an impairing substance when the defendant has consumed a sufficient quantity of that impairing substance to cause the defendant to lose the normal control of the defendant's bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties, or (2) that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath. A relevant time is any time after driving that the driver still has in the driver's body alcohol consumed before or during driving. If the evidence tends to show that a chemical test known as an Intoxilyzer was offered to the defendant by a law enforcement officer and that the defendant refused to take the test or that the defendant refused to perform a field sobriety test at the request of an officer, you may consider this evidence together with all other evidence in determining whether the defendant was under the influence of an impairing substance at the time that the defendant drove a motor vehicle.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle on a highway or street in the state and that when doing so the defendant was under the influence of an impairing substance or that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of the breath, it would be your duty to return a verdict of guilty. If you

> do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defendant argues the trial court erred in instructing the jury under N.C. Gen. Stat. § 20-138.1 (a)(2), and such error is reversible error. The State concedes the trial court erred in its jury instructions. However, the State contends any error was harmless error, and Defendant is not entitled to a new trial.

We agree with both Defendant and State and hold the trial court erred in instructing the jury under both N.C. Gen. Stat. § 20-138.1(a)(1) and (a)(2). Although disjunctive jury instructions are generally permissible for impaired driving, in this case, the State presented *no* evidence supporting the section 20-138.1(a)(2) instruction. *Compare Oliver*, 343 N.C. at 215, 470 S.E.2d at 24, *with Johnson*, 183 N.C. App. at 582, 646 S.E.2d at 127. Defendant did not properly participate in the Intoxilyzer test, and the State introduced no evidence of blood alcohol tests. As such, the trial court improperly instructed the jury on alternate theories, one of which the evidence did not support.

It is impossible to conclude, based upon the record and general verdict form, upon which theory the jury based its verdict. Our case law mandates our Court to "assume the jury based its verdict on the theory for which it received an improper instruction." *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) (citations omitted).

Furthermore, cannot agree with the State that the error was harmless or non-prejudicial. It is settled law this error entitles Defendant to a new trial. Under controlling case law:

> [w]here the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

State v. Pakulski, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) (citation omitted). *See State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (holding such error entitled defendant to a new trial); *Malachi*, ___ N.C. App. at ___, ___ S.E.2d at ___; *State v. Jefferies*, ___ N.C. App. ___, ___, 776 S.E.2d 872, 880 (2015); *Johnson*, 183 N.C. App. at 585, 646

S.E.2d at 128; *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79 (1994); *State v. O'Rourke*, 114 N.C. App. 435, 442, 442 S.E.2d 137, 140 (1994) (citation omitted); *State v. Dick*, No. COA15-1400, 2016 WL 5746395 (unpublished) (N.C. Ct. App. Oct. 4, 2016). *See also State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citation omitted) ("Where jury instructions are given without supporting evidence, a new trial is required.").

Moreover, this is not a case where there is overwhelming evidence of Defendant's impaired driving. Before beginning the field sobriety tests, Defendant told Officer Monroe he suffers from knee pain. During the tests, Defendant told Officer Monroe he needed his knee pads to complete the tests. Officer Monroe testified Defendant lost his balance However, Defendant neither fell during the tests, nor did he stumble or try to lean upon anything for balance.

Accordingly, we vacate Defendant's conviction for impaired driving and grant him a new trial.

B. Expert Testimony

Defendant also contends the trial court erred by allowing Officer Monroe to testify as an expert in "the administration and interpretation" of the HGN test. Although the issue of expert testimony for the HGN test needs to be resolved, the record and arguments in this case are insufficient to address this issue. Because we grant Defendant a new trial based on the trial court's error in jury instructions, we need not address this issue on appeal.

IV. Conclusion

For the foregoing reasons, we vacate Defendant's conviction and grant him a new trial.

NEW TRIAL.

Judge CALABRIA concurs.

Judge BERGER concurring in a separate opinion.

BERGER, Judge, concurring.

I reluctantly concur in the result reached by this Court as I am compelled to follow the law as it currently exists. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent,

unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). However, it seems that, given the reasoning in recent opinions from our Supreme Court, harmless error analysis should be undertaken.

It is uncontroverted that, in the State's case-in-chief for the driving while impaired charge, there was no evidence presented at trial regarding Defendant's blood alcohol concentration, only evidence concerning an appreciable impairment theory. The trial court conducted a charge conference at the conclusion of all the evidence, and the record shows the court initially intended to instruct only on the appreciable impairment theory. However, the State argued, as shown below, that Defendant's counsel intended to argue in closing that the State had failed to prove Defendant's blood alcohol concentration:

> THE COURT: I plan on giving . . . 270.20A, impaired driving. I will give the instructions on appreciable impairment as I assume that's the theory that the state is proceeding under.
>
> . . .
>
> [THE STATE]: Your Honor, I would request the .08 instruction just so I can use it in my argument.
>
> THE COURT: All right.
>
> [ATTORNEY FOR DEFENDANT]: As there was no evidence to sort of an actual number of any blood alcohol level, I would object to that instruction.
>
> THE COURT: Well, if you argue they haven't shown .08 I'm going to give that instruction or they haven't shown his blood alcohol content I will give that instruction because you can't have it both ways. You can't -- you can't object to the instruction and argue that they haven't shown his BAC because there are more than one way to prove the offense.
>
> [ATTORNEY FOR DEFENDANT]: Well, my argument about the blood would be more along the

line of not talking about any number at any point, just amount. If the blood came back and it was clear of all alcohol, there's no alcohol, there cannot possibly be an alcohol impairment. If there was only a minimal amount, .01 or .02, it couldn't be impairment.

THE COURT: Well, why agree with that because someone could have a .01 and .02 and still be impaired with that particular person. I mean, the only evidence is that there was consumption of alcohol. I mean, I will –

[THE STATE]: Your Honor, I'm almost confident [Attorney for Defendant]'s going to be arguing a portion of the blood test not being done and, you know, I mean, I think that that would allow us to at least have that instruction and then kind of explain why we don't have that in this case, so, I mean, I think it's appropriate to put it in there.

THE COURT: I'll go ahead and give B. Anything further? And I note your objection.

The trial court then instructed the jury consistent with the Pattern Jury Instruction for Driving While Impaired, as follows:

> The defendant has been charged with impaired driving. For you to find the defendant guilty of this offense the state must prove three things beyond a reasonable doubt:
>
> First, that the defendant was driving a vehicle.
>
> Second, that the defendant was driving that vehicle upon a highway or street within the state.
>
> And third, that the defendant was driving that vehicle, (1) that the defendant was under the influence of an impairing substance. Alcohol is an impairing substance. The defendant is under the influence of an impairing substance when the defendant has consumed a sufficient quantity of that impairing substance to cause the defendant to lose the normal control of the defendant's

> bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties, or (2) that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath. A relevant time is any time after driving that the driver still has in the driver's body alcohol consumed before or during driving.
>
> If the evidence tends to show that a chemical test known as an Intoxilyzer was offered to the defendant by a law enforcement officer and that the defendant refused to take the test or that the defendant refused to perform a field sobriety test at the request of an officer, you may consider this evidence together with all other evidence in determining whether the defendant was under the influence of an impairing substance at the time that the defendant drove a motor vehicle.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle on a highway or street in the state and that when doing so the defendant was under the influence of an impairing substance or that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of the breath, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The trial court erred in giving the instructions regarding .08 blood alcohol concentration, where it should have only instructed the jury on appreciable impairment. A disjunctive instruction is erroneous if there is no "evidence to support all of the alternative acts that will satisfy the element." *State v. Johnson*, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007). The North Carolina Supreme Court held in *State v. Pakulski* that:

> Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based

> its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

State v. Pakulski, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987). *See also State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) ("[W]e must assume the jury based its verdict on the theory for which it received an improper instruction." (citations omitted)); *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990); *State v. Johnson*, 183 N.C. App. 576, 646 S.E.2d 123 (2007); *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79 (1994) ("We are required, we believe, to order a new trial . . . ."), *disc. review denied*, 337 N.C. 697, 448 S.E.2d 536 (1994); *State v. Dick*, ___ N.C. App. ___, 791 S.E.2d 873 (2016) (unpublished); *State v. Malachi*, ___ N.C. App. ___, ___ S.E.2d ___, COA16-752, 2017 WL 1381592 (2017). These cases set forth a *per se* plain error rule requiring a new trial when a disjunctive instruction is given and there is no evidence to support each of the theories submitted to the jury.

However, the North Carolina Supreme Court appears to be shifting away from this *per se* plain error rule for disjunctive jury instructions. In *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012), that Court reaffirmed and clarified that "the plain error standard of review applies on appeal to unpreserved instructional" errors in the context of jury instructions. *Lawrence*, at 518, 723 S.E.2d at 334. The Supreme Court also noted that N.C. Gen. Stat. § 15A-1443 differentiated the harmless error standard of review, which applies only to preserved errors.

> [H]armless error review functions the same way in both federal and state courts: Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. . . . [A]n error . . . [is] harmless if the jury verdict would have been the same absent the error. Under both the federal and state harmless error standards, the government bears the burden of showing that no prejudice resulted from the challenged federal constitutional error. But if the error relates to a right not arising under the United States Constitution, North Carolina harmless error review requires the defendant to bear the burden of showing prejudice. In such cases the defendant must show a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

Lawrence, at 513, 723 S.E.2d at 331 (internal citations, quotation marks, and brackets omitted).

In *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013), our Supreme Court, after directing this Court to follow the analysis in *Lawrence*, adopted a dissent from the Court of Appeals which applied plain error review to an unpreserved error concerning a jury instruction for which there was no evidence. *See State v. Boyd*, 222 N.C. App. 160, 730 S.E.2d 193 (2012) (Stroud, J., dissenting), *dissent adopted by* 366 N.C. 548, 742 S.E.2d 798 (2013).

More recently, the Supreme Court remanded to this Court the case of *State v. Martinez*, in which the trial court erred when it instructed the jury in a sexual offense case on a theory not supported by the evidence offered at trial. *State v. Martinez*, ___ N.C. App. ___, 795 S.E.2d 433 (2016) (unpublished), *writ dismissed*, ___ N.C. ___, 797 S.E.2d 5 (2017). Initially, this Court held that "there was an ambiguity as to which sexual act the jury found Defendant had committed, and therefore [we] 'must resolve this ambiguity in favor of Defendant.' " *Id.* at ___ (quoting *State v. Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326) (brackets omitted). Our Supreme Court remanded the case, directing us to determine whether or not the trial court's instructions in that matter amounted to plain error as set forth in *Boyd*.

However, in the case *sub judice*, the error under review was preserved, as Defendant's counsel objected to the instruction. For preserved error, harmless error analysis should be applied pursuant to the plain language of N.C. Gen. Stat. § 15A-1443 and as discussed in *Lawrence*. But, this is not the current state of the law. Even so, the majority engages in a harmless error analysis when it states, "this is not a case where there is overwhelming evidence of Defendant's impaired driving" and then discusses the facts it believes supports that conclusion.

Were we to engage in a harmless error analysis, which under current case law we cannot do, I believe a different conclusion would be required. The evidence in the record tended to show that Defendant drove his truck into the path of Officer Monroe's motorcycle. In order to avoid a collision with Defendant's vehicle, Officer Monroe was forced to "lock the bike up and then immediately make an evasive maneuver" and abruptly shift lanes. Officer Monroe initiated a traffic stop, and observed that Defendant had red, glassy eyes, spoke with slurred speech, and had a medium odor of alcohol on his breath. When asked why he pulled out into the path of the officer's motorcycle, Defendant said the officer had enough room and that he "was catching [the officer's]

curiosity." Officer Monroe then asked Defendant if he had consumed any alcohol prior to driving that evening, and Defendant responded that "he had one to two drinks" of Jägermeister. Defendant was asked to exit the vehicle to perform field sobriety tests.

Defendant was visibly swaying and unable to keep his balance while the officer was providing instructions for the walk-and-turn test. Defendant also began the test before being instructed to do so on two occasions. At this point, Defendant told Officer Monroe "that he can't do the test, he's not going to do the test."

Officer Monroe then attempted to have Defendant perform the one-legged stand test. Defendant again was visibly swaying and unable to perform the test as instructed. When Officer Monroe offered to demonstrate the test again, Defendant indicated he did not want to perform the test.

After he was arrested for driving while impaired, Defendant was taken to the Raleigh Police Department. There, Officer Monroe attempted to administer a blood alcohol test on the ECIR-2 ("Intoxilyzer"). Defendant took a breath and blew into the instrument to provide a sample. Defendant was performing this test as instructed, but then he stopped and indicated he was not going to continue with the test. Defendant's failure to complete the Intoxilyzer test resulted in a refusal. No blood test was performed, and no numerical value was ever obtained for Defendant's blood alcohol concentration for this incident.

It was this evidence upon which the jury deliberated and convicted Defendant. The jury heard no evidence regarding a numerical finding of Defendant's blood alcohol concentration, yet we are required to assume the jury's verdict was based upon a finding that Defendant's blood alcohol concentration was .08 or higher. *See State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) (citation omitted) ("[W]e must assume the jury based its verdict on the theory for which it received an improper instruction." (citations omitted)).

Jurors are instructed prior to every trial that they should "use the same good judgment and common sense that you use[ ] in handling your own affairs . . . ." N.C.P.I.--Crim. 100.21 (2015). In reviewing the entire record in this case, one could reasonably conclude that, because there was no evidence of impaired driving under N.C. Gen. Stat. § 20-138.1(a)(2), the jurors did as they were instructed: they used their "good judgment and common sense," and relied upon the appreciable impairment theory.

Concluding the harmless error analysis, it cannot be said that a different result would have been reached in this case had the error in question not been committed. Defendant failed to establish that there was a reasonable possibility that the .08 instruction contributed to his conviction given the evidence of appreciable impairment. I would find the erroneous instruction harmless beyond a reasonable doubt.

While this may be the analysis the North Carolina Supreme Court would prefer us to utilize given the plain language of N.C. Gen. Stat. § 15A-1443 and a broader reading of *Lawrence*, *Boyd*, and *Martinez*, this Court must apply the law as it is. If the North Carolina Supreme Court is, in fact, changing the standard of review we are to apply to disjunctive instructions given in error, straightforward direction from that higher court would be beneficial.

STATE OF NORTH CAROLINA
v.
SUSAN MARIE MALONEY

No. COA16-851

Filed 16 May 2017

1. Appeal and Error—preservation of issues—plain error not argued—appeal dismissed

An issue concerning the instruction of the jury on two counts of manufacturing methamphetamine was not preserved for appeal where defendant did not object at trial and did not specifically and distinctly argue plain error on appeal. The issue was deemed waived.

2. Drugs—methamphetamine—possession of precursor chemicals—indictment not sufficient

The trial court lacked jurisdiction, and a conviction for possession of the precursor chemicals to methamphetamine was vacated where the indictment was fatally flawed in that it failed to allege an essential element of the crime (that defendant knew or had reason to know that the materials would be used to manufacture methamphetamine). The State's amendment of the indictment to add the missing element could not cure the defect.

3. Drugs—continuing offense—manufacture of methamphetamine

The Court of Appeals concluded in an alternative argument that the trial court did not err by entering judgment on two separate counts of manufacturing methamphetamine. Debris from the manufacturing process was found in black garbage bags in two separate locations, a storage unit and the trunk of a car. Although defendant contended that the evidence suggested a continuous operation by the same participants, the garbage bags contained evidence that separate manufacturing offenses had been completed and defendant's own witness testified that the garbage bags contained trash from separate batches manufactured on separate dates.

Judge MURPHY concurring in part and concurring in the result in part.

Appeal by defendant from judgment entered 15 February 2016 by Judge Marvin K. Blount III in Beaufort County Superior Court. Heard in the Court of Appeals 21 March 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Michael E. Casterline for defendant-appellant.

BRYANT, Judge.

Where defendant failed to specifically and distinctly contend on appeal that the trial court's jury instruction amounted to plain error, we consider this argument waived. Where a fatally defective indictment could not be cured by the State's material amendment prior to trial, we arrest judgment on and vacate the conviction. Lastly, where the evidence at trial demonstrated termination, not continuation, of manufacturing of methamphetamine in more than one location, two counts of manufacturing of methamphetamine do not constitute a continuing offense, and the trial court committed no error in denying defendant's motions to dismiss.

In September 2013, officers at the Beaufort County Sheriff's Office received information that Randall Burmeister and an unknown female had been making numerous pseudoephedrine ("PSE") purchases at area pharmacies. PSE is a precursor chemical in the manufacture of methamphetamine and is also an ingredient in some over-the-counter cold and allergy drugs. Purchases of products containing PSE are tracked through the National Precursor Log Exchange ("NPLEX")

database. In order to buy a product containing PSE, an individual must present identification at the pharmacy. The individual's ID is scanned and entered into the NPLEX database, along with the amount of PSE purchased. If the purchase exceeds a permissible threshold amount, the sale will be blocked.

By analyzing NPLEX records, investigators determined that Burmeister's companion was defendant Susan Marie Maloney. Defendant and Burmeister met in Illinois in 2008, shortly after Burmeister was released from prison after serving seven years for manufacturing methamphetamine.

At the request of investigators, a Walgreens pharmacist contacted police when Burmeister and Maloney purchased a PSE product on 7 October 2013. Under police surveillance, the couple left the store in a blue Taurus and drove to a residence on River Road, where officers confronted the couple in the driveway as they got out of their car.

Burmeister and defendant were not the owners of the residence, but were renting a room. Burmeister gave police permission to search their room, and the house's owner, Ricky Brass, permitted police to search the entire house and the blue Taurus, which he also owned. In the back seat of the car, Lieutenant Russell Davenport found a bag containing bags of salt, which is used in the last process of cooking methamphetamine. In the trunk of the car, Lieutenant Davenport found a black garbage bag. Upon opening it, he was overcome with fumes. The police immediately secured the scene and called the State Bureau of Investigation ("SBI"). Burmeister and defendant were taken into custody.

However, defendant, who had recently had heart surgery, was taken to the emergency room with chest pain. During the hours she was in the hospital, defendant told police officers that Burmeister had been arrested for making methamphetamine in Illinois. Defendant spent several hours in the hospital before being taken to the magistrate's office and served with an arrest warrant.

The next day, the SBI and local officers returned to the River Road residence. Among the items found inside the garbage bag in the trunk of the car were empty cans of solvent, a container of lye, an empty cold pack, tubing, a peeled lithium battery, a coffee filter, a funnel, a glass jar, and plastic bottles containing various residues and liquids. Inside the passenger compartment, officers also seized a container of table salt, needle-nosed pliers, a can of solvent, and a package of PSE decongestant tablets. Officers also searched defendant and Burmeister's rented

storage unit. There, they found another black garbage bag containing, *inter alia*, a cold pack, an empty pack of starter fluid, coffee filters, peeled lithium batteries, empty blister packs of nasal decongestant containing pseudoephedrine hydrochloride, and various bottles containing off-white crystalline material. At trial, State's witnesses testified that many of the items found in both the trunk of the Taurus and the storage unit could be used in the manufacture of methamphetamine using the "one-pot" or "shake-and-bake" method. Ultimately, three plastic bottles—two from the garbage bag found in the trunk of the car and one recovered from the garbage bag in the storage unit—were found to contain concentrations of methamphetamine.

On 7 April 2014, defendant was indicted by a Beaufort County grand jury in case 13 CRS 52279 for one count of manufacturing methamphetamine and one count of possession of drug paraphernalia. Defendant was also indicted in case 13 CRS 52289 for one count of manufacturing methamphetamine, one count of possession of methamphetamine precursor materials (salt, sulfuric acid, lithium, ammonium nitrate and pseudoephedrine), and one count of possession of methamphetamine. All offenses were alleged to have occurred on or about 8 October 2013.

Defendant's cases were called for jury trial on 8 February 2016 before the Honorable Marvin K. Blount III in Beaufort County Superior Court. The district attorney made a motion to amend the second count in the indictment in case 13 CRS 52289, the charge of possession of precursors to methamphetamine, which motion the court granted.

At the close of the State's evidence, defendant made a motion to dismiss, which the court denied. Defendant presented evidence, testifying in her own defense and calling additional witnesses. Among the witnesses who testified on behalf of defendant was Burmeister, who had previously pled guilty shortly after his arrest for his involvement in the same incident underlying this appeal.

Burmeister told the court that upon moving from Illinois to North Carolina, he resumed making methamphetamine using the "one-pot" or "shake-and-bake" method. He testified that the garbage bags found in the car and the storage unit both held trash from separate batches of methamphetamine. He also testified that, after defendant's surgery, he would use her to help him obtain the PSE he needed to make methamphetamine. His practice was to give defendant a dose of her medication that made her "doped up." Then, he would take defendant to a pharmacy, put her driver's license in her hand, "grab the card [for the

PSE] off the shelf, stick it in her hand, and walk her up to the window because she didn't know what was going on. She didn't know where we were." A pharmacy tech from the Walmart pharmacy also testified for defendant, who recalled seeing defendant several times in the fall of 2013. According to the tech, defendant was always accompanied by Burmeister, who presented defendant's identification and requested the medication. The tech testified that defendant appeared "sickly," "a little disoriented," and seemed not to know what she needed, or what she was buying.

At the close of all the evidence, the court again denied defendant's motion to dismiss. Defendant was found guilty of each charge and the judge entered two consolidated judgments. In 13 CRS 52279, defendant received a sentence of fifty-eight to eighty-two months, and in 13 CRS 52289, defendant received another sentence of fifty-eight to eighty-two months, to be served at the expiration of the first sentence. Defendant appeals.

On appeal, defendant contends the trial court (I) erred in entering judgment on two counts of manufacturing methamphetamine where the trial court failed to instruct the jury on two distinct offenses; (II) lacked jurisdiction to enter judgment for possession of precursor materials; and (III) erred in entering judgment for two counts of manufacturing methamphetamine as the crime was a "continuing offense."

I

[1] Defendant first argues the trial court erred in entering judgment on two counts of manufacturing methamphetamine where the trial court failed to instruct the jury on two distinct offenses. In other words, defendant contends the trial court's failure to so instruct functioned to dismiss one of the manufacturing indictments as a matter of law and, therefore, one conviction arising from that indictment must be vacated.

Defendant has failed to properly preserve this issue for our review by not objecting at trial—either during the charge conference or before the jury retired—to the court's failure to instruct on what defendant now considers relevant instructions. Defendant will not now be heard on this issue. "A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires . . . ." N.C. R. App. P. 10(a)(2) (2017). "Therefore, defendant is entitled only to review pursuant to the plain error rule." *State v. Call*, 349 N.C. 382, 424, 508 S.E.2d 496, 522 (1998) (citation omitted).

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is *specifically and distinctly* contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2017).

However, because defendant failed to "specifically and distinctly" argue plain error on appeal, she has waived appellate review. We deem this assignment of error waived. *See State v. Davis*, 202 N.C. App. 490, 497, 688 S.E.2d 829, 834 (2010) ("[B]ecause [the] [D]efendant did not 'specifically and distinctly' allege plain error as required by [our appellate rules], [the] [D]efendant is not entitled to plain error review of this issue." (quoting *State v. Dennison*, 359 N.C. 312, 312–13, 608 S.E.2d 756, 757 (2005)).[1]

II

[2] Next, defendant argues the trial court lacked jurisdiction to enter judgment for possession of precursor chemicals because the indictment for that offense was fatally defective and the State's attempt to cure the defect involved a substantial alteration to the indictment. In other words, defendant contends that because the indictment could not be cured at trial by amendment, the trial court lacked jurisdiction as to this offense and defendant's conviction for possession of methamphetamine precursor materials should be vacated. We agree.

"Although defendant did not object at trial to the facial inadequacy of the precursor indictment, '[a] challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal.' " *State v. Oxendine*, ___ N.C. App. ___, ___, 783 S.E.2d 286, 289 (2016) (alteration in original) (quoting *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010)). "[W]e review the sufficiency of an indictment *de novo*." *Id.* (quoting *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009)).

"To be valid 'an indictment must allege every essential element of the criminal offense it purports to charge.' " *Id.* (quoting *State v. Billinger*, 213 N.C. App. 249, 255, 714 S.E.2d 201, 206 (2011)). "A conviction based on a flawed indictment must be arrested." *State v. De La Sancha Cobos*,

1. Further, we reject defendant's attempt to recast this issue on appeal as structural error requiring *de novo* review and dismissal as a matter of law.

211 N.C. App. 536, 540, 711 S.E.2d 464, 468 (2011) (citing *State v. Outlaw*, 159 N.C. App. 423, 428, 583 S.E.2d 625, 629 (2003)).

In *State v. Oxendine*, the indictment charging the defendant with possessing an immediate precursor chemical with intent to manufacture methamphetamine or possessing precursor chemicals "knowing, or having reasonable cause to believe," that the precursor chemicals will be used to manufacture methamphetamine

> fail[ed] to allege that [the] defendant, when he possessed those materials, intended to use them, knew they would be used, or had reasonable cause to believe they would be used to manufacture methamphetamine. *The indictment contain[ed] nothing about [the] defendant's intent or knowledge about how the materials would be used.*

___ N.C. App. at ___, 783 S.E.2d at 289 (emphasis added). Instead, the indictment in *Oxendine* alleged that the defendant "unlawfully, willfully and feloniously did possess [precursor chemicals] used in the manufacture of methamphetamine." Id. Accordingly, this Court arrested judgment on the defendant's conviction of possession of a precursor chemical because, "[w]ithout an allegation that [the] defendant possessed the required intent, knowledge, or cause to believe, the indictment fail[ed] to allege an essential element of the crime." *Id.* at ___, 783 S.E.2d at 290.

We agree with defendant, and the State acknowledges, that *State v. Oxendine* is directly applicable to the instant case. Here, on 9 February 2016 during pretrial motions, the district attorney made a motion to amend the second count in the indictment in case 13 CRS 52289, the charge of possession of precursor materials used to produce methamphetamine:

> [THE STATE:] . . . In this case, we're requesting the language be substituted--knowing or having reasonable cause to believe that the immediate precursor chemical would be used to manufacture methamphetamine, a controlled substance.
>
> THE COURT: Okay. All right. The State's motion is allowed.

As a result, Count II of the indictment in case 13 CRS 52289, was amended (the district attorney's handwritten addition is underlined), to read as follows:

> The jurors for the State upon their oath present that on or about the date shown above and in the county named above, the defendant named above unlawfully, willfully and did knowingly possess salt, sulfuric acid, lithium, amonium [sic] nitrate and pseudoephedrine, such items being precursors used to produce methamphetamine know or have reason to know and cause to believe that the immediate precursor chemical would be used to manufacture a controlled subs [sic].

Similar to the indictment in *Oxendine*, here, Count II of the indictment in case 13 CRS 52289 also fails to allege an essential element of the crime, namely, defendant's intent or knowledge "about how the materials would be used," i.e., "for manufacture of methamphetamine by h[er]self or someone else." *See id.* at ___, ___, 783 S.E.2d at 289, 290.

"The Criminal Procedure Act provides that '[a] bill of indictment may not be amended.' " *De La Sancha Cobos*, 211 N.C. App. at 541, 711 S.E.2d at 468 (alteration in original) (quoting N.C. Gen. Stat. § 15A-923(e) (2009)). An "amendment" is "any change in the indictment which would substantially alter the charge set forth in the indictment." *Id.* (quoting *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996)). Where an amendment to an indictment involves an element of the crime charged, it is a "material" one. *See id.* at 542, 711 S.E.2d at 468–69.

Here, the State attempted to materially amend Count II of the indictment in case 13 CRS 52289 before trial by adding that defendant knew or had reason to know that the immediate precursor materials would be used to manufacture methamphetamine, a controlled substance. This language, which functioned to establish an essential element of the crime of possession of precursor materials, materially amended the flawed indictment and constitutes reversible error. Because this fatally defective indictment could not be cured by the State's material amendment prior to trial, we arrest the trial court's judgment and vacate defendant's conviction on Count II of the indictment in case 13 CRS 52289.

III

[3] Lastly, and in the alternative to defendant's argument in Section I, *supra*, defendant contends the trial court erred in entering judgment for two separate counts of manufacturing methamphetamine because the crime was a single continuing offense and, therefore, one of defendant's convictions should be vacated. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citations omitted).

"A continuing offense . . . is a breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences." *State v. Johnson*, 212 N.C. 566, 570, 194 S.E.2d 319, 322 (1937). "North Carolina appellate courts have held that analogous activities are continuing offenses." *State v. Grady*, 136 N.C. App. 394, 400, 524 S.E.2d 75, 79 (2000) (citations omitted); *see also State v. Calvino*, 179 N.C. App. 219, 223, 632 S.E.2d 839, 843 (2006) (vacating one of two convictions for keeping a vehicle for selling a controlled substance as double jeopardy prohibits a conviction for two counts under the applicable statute as "the offense is a continuing offense"). For example, illegal possession of stolen property is a continuing offense beginning at receipt and continuing until divestment, *see State v. Davis*, 302 N.C. 370, 372–75, 275 S.E.2d 491, 493–94 (1981), and kidnapping is a continuing offense that lasts from the time of initial confinement until the victim regains free will, *see State v. White*, 127 N.C. App. 565, 570, 492 S.E.2d 48, 51 (1997).

In *Grady*, the defendant was charged with two counts of maintaining a dwelling for the use of a controlled substance. In determining that maintaining a dwelling is a continuing offense, this Court noted that, if it were not, "the State would be free . . . to 'divide a single act . . . into as many counts . . . as the prosecutor could devise.' " 136 N.C. App. at 400, 524 S.E.2d at 79 (alterations in original) (quoting *White*, 127 N.C. App. at 570, 492 S.E.2d at 51). This Court also described a situation which would not constitute a continuing offense: "There is no evidence indicating a termination and subsequent resumption of drug trafficking at this dwelling; to the contrary, the evidence shows that drugs were readily available there on request throughout the investigation." *Id.* In other words, because the act of maintaining a dwelling in *Grady* involved drug

transactions which took place over time at a single dwelling, the act of maintaining a dwelling could not be divided into discrete events (it was a continuing offense), and, therefore, the two convictions violated the constitutional prohibition against double jeopardy. *Id.*

The crime of manufacturing a controlled substance "means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means . . . ." N.C. Gen. Stat. § 90-87(15) (2015). In the instant case, two separate methamphetamine labs, or the evidence thereof, were discovered in the trunk of the Taurus and in the storage unit. In both locations, various materials related to the manufacture of methamphetamine were discovered in black garbage bags. Defendant argues that this "evidence suggests a single continuous operation where the same participants were making batches of the drug, with various stages of the preparation and processing occurring in locations which included the residence, the car, and the storage locker."

We disagree with defendant's characterization. In the present case, the evidence at trial demonstrated termination, not continuation, of separate processes of manufacturing methamphetamine in more than one location. In both locations—the trunk of the car and the storage unit—the chemical reaction process had reached the end stage where gas had been introduced into the liquid to precipitate a useable form of methamphetamine. In other words, the two separate garbage bags found in two distinct locations each contained evidence that separate manufacturing offenses had been completed. In fact, defendant's own witness made the point that the garbage bags held trash from separate batches of methamphetamine manufactured on separate dates. While we do not think the statute necessarily requires a completed process—"manufacturing a controlled substance means the production, *preparation*, propagation, compounding, conversion, or processing of a controlled substance by any means," *id.* § 90-87(15) (emphasis added)—based on the facts present in the instant case, it is clear that two separate and distinct locations contained two separate methamphetamine manufacturing processes. Accordingly, the trial court did not err by entering judgment for two separate counts of manufacturing methamphetamine. Defendant's argument is overruled.

NO ERROR IN PART; JUDGMENT ARRESTED AND CONVICTION VACATED IN PART.

Judge INMAN concurs.

Judge MURPHY concurs as to Parts I and II, and concurs in the result in Part III by separate opinion.

MURPHY, Judge, Concurring as to Parts I and II and the result of Part III.

I concur in the Court's opinion as to Parts I and II and the result of Part III, but I write separately to express my concerns regarding the application of N.C.G.S. § 90-87(15) to the manufacture of methamphetamine.

In the present case, there were three locations where drug manufacturing material was found: in Maloney and Burmeister's bedroom, in the storage unit Maloney had rented, and in the car the couple had borrowed from Brass. Indictments were filed regarding the materials found in the car and storage unit, but not the bedroom. Defendant argues that the manufacture of a controlled substance, lacking any specified duration or particular culmination, is a continuing offense. The majority emphasizes the separate locations of the materials found. However, I would hold that the locations of the items found are not controlling on the number of counts of manufacturing methamphetamine as the items found were only indicative of past "one-pot" manufacturing or the intention and ability to "cook" in the future.

As the majority points out, there were three empty bottles evidencing past cooks. I believe that each one-pot cook constituted an act of manufacturing methamphetamine under the statute as it is the bulk of the eventual completed process of turning chemicals into the controlled substance. While I arrive at the same result as the majority today, had all three bottles been in the same location I still would have found no error as they were merely trash and evidence of past illegal conduct.

As was discussed at length during arguments of counsel, there are many ways to analyze one continuing process as opposed to individual acts of manufacturing methamphetamine. It is a reasonable reading of the statute and our case law that multiple bottles cooked in the same room and producing hundreds of grams of methamphetamine without a significant break in production could result in only one conviction of manufacturing. Alternatively, it is just as reasonable a reading of the statute and case law that each time an additional amount of catalyst is introduced into the chemical solution the bottle starts a new chemical reaction and is an individual, though small, manufacture of

methamphetamine which could reasonably result in the conviction of multiple counts from a single one-pot cook.

First-time offenders face a minimum presumptive sentence of 58 to 82 months for each offense of manufacturing methamphetamine, thus it is of great importance to the public that statutes such as N.C.G.S. § 90-87(15) are well-defined. The current statute and case law, even after today's decision, leave open to interpretation what constitutes one continuing offense of manufacture versus several separate instances.

I concur in today's result, but believe it is extremely important for this matter to be addressed for future decisions and to ensure the equal application of our statutes across the state. However, as an error-correcting court, we do not have the power to address policy concerns that may exist for various conflicting factual situations. This matter should be readdressed by the General Assembly or our Supreme Court.

STATE OF NORTH CAROLINA
v.
JESUS MARTINEZ, DEFENDANT

No. COA16-374-2

Filed 16 May 2017

1. Constitutional Law—federal—effective assistance of counse—failure to object to doctor's testimony—testimony admissible

Defendant was not denied effective assistance of counsel where his trial counsel did not object to a doctor's testimony about a child sexual abuse victim. The doctor testified, "But in the fact that she did experience abuse," but the statement in context referred to a hypothetical victim and did not amount to a statement that this victim was in fact abused.

2. Constitutional Law—federal—right to impartial jury—juror's statement—no plain error

The trial court's failure to act upon a prospective juror's statement did not amount to plain error in a prosecution for the sexual abuse of a child. The prospective juror said that her uncle was a defense attorney and that he had said his job was to "get the bad guys off." Although defendant contended that this amounted to a comment on his guilt, it was a generic statement and did not

imply that the prospective juror had any particular knowledge of defendant's case or the possibility that he might be guilty.

3. Criminal Law—jury instructions—disjunctive—one offense not supported by evidence

There was no plain error in a prosecution for several types of sexual abuse of a child where the trial court gave disjunctive instructions on the types of abuse but one type was not supported by the evidence. Defendant did not meet his burden of showing that the instruction had any probable impact on the verdict.

4. Appeal and Error—preservation of issues—offer of proof—not sufficient

Defendant did not preserve for appellate review issues concerning excluded evidence of bias against him in a prosecution for the sexual abuse of a child. Although defendant contended that his statements were an offer of proof, speculation about what the testimony would have been was not sufficient to show the actual content of the testimony.

5. Evidence—prior accusation of domestic violence—other evidence of guilt—exclusion—no prejudicial error

There was no prejudicial error in a prosecution for the sexual abuse of a child where the trial court erroneously excluded evidence that the mother had previously accused defendant of domestic violence, possibly indicating bias. Considering the other evidence of guilt, there was not a reasonable possibility of another result had the evidence been heard.

Judge BRYANT concurring in the result.

Appeal by Defendant from judgments entered 18 September 2015 by Judge Yvonne M. Evans in Mecklenburg County Superior Court.

Originally heard in the Court of Appeals 20 September 2016. By opinion filed 30 December 2016, this Court found no reversible error as to five of the eleven convictions, but vacated the other six convictions based on our conclusion that certain jury instructions constituted plain error.

By Order entered 16 March 2017, our Supreme Court remanded the matter to our Court for the limited purpose "of determining whether the trial court's instruction held to have been erroneous by the Court of Appeals constituted plain error as required by *State v. Boyd*, 222

N.C. App. 160, 730 S.E.2d 193 (2012), *rev'd for the reasons stated in the dissenting opinion*, 366 N.C. 548, 742 S.E.2d 798 (2013)."

This opinion replaces the original Opinion filed on 30 December 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lauren M. Clemmons, for the State.

Hale Blau & Saad, P.C., by Daniel M. Blau, for the Defendant.

DILLON, Judge.

Jesus Martinez ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of eleven felonies based on sexual conduct he engaged in with a minor.

I. Background

The evidence at trial tended to show as follows: Defendant was cohabiting with his girlfriend ("Mother"), *their* infant child, and Mother's three children from a prior relationship.

Mother testified that one morning, she walked into the bedroom she shared with Defendant and saw the sheets "moving up and down." She pulled back the sheets and saw her eight-year-old daughter, Chloe[1], curled into a "little ball" and "hiding." Mother later asked Chloe what had been happening, and Chloe replied that Defendant had engaged in certain sexual conduct with her and had also done so in the past.

At trial, Chloe testified in detail regarding incidents where Defendant had engaged in sexual acts with her.

Defendant testified that when Mother walked into the bedroom, he and Chloe had simply been spending time together in bed, that both had been fully clothed, and that Mother had misinterpreted the situation.

Mother informed law enforcement of the incident, and Defendant was subsequently arrested and indicted for numerous offenses. Defendant was convicted of eleven felonies: four counts of sex offense in a parental role, two counts of sex offense with a child, and five other felonies. Defendant timely appealed.

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1. A pseudonym.

II. Analysis

Defendant makes four arguments on appeal: (1) that a medical expert witness impermissibly vouched for Chloe's credibility; (2) that a prospective juror made grossly prejudicial remarks during jury selection; (3) that the trial court's disjunctive instruction relating to the six "sexual offense" charges constituted plain error; and (4) that Defendant should have been allowed to introduce certain evidence to impeach the testimony of Chloe's mother. We address each argument in turn.

A. Expert Testimony

[1] Defendant's first set of arguments relate to a statement made by Dr. Patricia Morgan which Defendant contends constituted improper vouching by an expert. During direct examination, Dr. Morgan made the following statement:

> PROSECUTOR: . . . [W]ould you be able to confirm [from a medical exam] whether or not [Chloe] could have experienced vaginal bleeding a month or so prior?
>
> DR. MORGAN: It might be difficult to say because, again, that finding in and of itself I could see it in a girl who may not have experienced abuse. But ***in the fact that she did experience abuse***, as well as have those findings of bleeding that she –
>
> [Defense Counsel interrupted Dr. Morgan's testimony with an objection, but then withdrew the objection immediately.]
>
> DR. MORGAN: Could you give me the question again, please? I want to make sure I'm answering it properly.
>
> PROSECUTOR: Yes, ma'am. I was just asking if in looking at the hymen, if you knew one way or the other if she previously experienced bleeding. Can you tell by looking at it?
>
> DR. MORGAN: If by looking at it I wouldn't be able to necessarily say if she had any bleeding because, again, the nature of the hymen is that it heals. And so I really couldn't say unless there was some residual or something that was evidence that shows that there was trauma.

(emphasis added).

On appeal, Defendant contends Dr. Morgan's statement emphasized above – that "in the fact that she did experience abuse" – constituted inadmissible expert opinion regarding Chloe's *credibility*. Defendant also contends that his counsel's failure to object constituted ineffective assistance of counsel.

Our Supreme Court has held that in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility. *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002).

However, we conclude that Dr. Morgan's statement, considered in the context of her testimony as a whole, does not amount to an assertion that Chloe was in fact abused. Rather, a proper understanding of the transcript is that Dr. Morgan was speaking of a hypothetical victim when she made the statement. Indeed, Dr. Morgan testified that Chloe's medical exam was normal and that she could not determine from the exam whether or not Chloe had been sexually abused.

Other cases from our Court in which plain error *was* found to be present involved much more conclusory statements made by the expert. For instance, in a case cited by Defendant, our Court found prejudicial error where an expert witness stated in response to a question: "My opinion was that she was sexually abused." *State v. Dixon*, 150 N.C. App. 46, 51, 563 S.E.2d 594, 598 (2002); *see also State v. Towe*, 366 N.C. 56, 60, 732 S.E.2d 564, 566 (2012) (finding plain error where expert stated that she would place the victim in the category of children who "have been sexually abused [and] have no abnormal findings"); *State v. Bush*, 164 N.C. App. 254, 259, 595 S.E.2d 715, 718 (2004) (finding plain error where expert stated: "My diagnosis was [that the child] was sexually abused by defendant"); *State v. Couser*, 163 N.C. App. 727, 732, 594 S.E.2d 420, 423-24 (2004) (finding plain error where expert testified that her diagnosis was "probable sexual abuse").

Here, we do not believe that Dr. Morgan made an impermissible statement that she believed that Chloe was in fact abused. Accordingly, defense counsel's failure to object was not error, and therefore did not constitute ineffective assistance of counsel.

B. Juror Remarks

[2] Defendant argues that a statement by one of the prospective jurors violated Defendant's constitutional right to an impartial jury and amounted to plain error. Specifically, Defendant contends that a

prospective juror's statement that her uncle was a local defense attorney who had told her his job was to "get the bad guys off" amounted to a comment on *Defendant's* guilt from a reliable source. We disagree.

The sole case cited by Defendant in support of this argument is *State v. Gregory*, in which a prospective juror stated that she helped prepare the defense for the defendant and had learned confidential information that would be favorable to the State if learned by the State. *State v. Gregory*, 342 N.C. 580, 587, 467 S.E.2d 28, 33 (1996). Our Supreme Court concluded that these statements "[were] likely to cause the [other] jurors to form an opinion before they heard any evidence at trial, and [] a juror who has formed an opinion cannot be impartial." *Id.* at 587, 467 S.E.2d at 33. Thus, the Court held that this statement denied the defendant a fair trial.

In contrast, here, the statement by the prospective juror was generic and did not imply that she had any particular knowledge of *Defendant's* case or the possibility that *Defendant* might be guilty. We do not believe that the trial court's failure to take specific action addressing the juror's comment amounted to plain error. *See State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991) (stating that the trial court "has broad discretion to see that a competent, fair and impartial jury is impaneled") (internal marks omitted)).

C. Jury Instructions

[3] Defendant's third set of arguments relates to jury instructions given by the trial court regarding his six "sexual offense" convictions. It is this set of arguments that is the basis for the limited remand by our Supreme Court. In our first opinion, we agreed with Defendant that the trial court committed plain error when it gave a jury instruction where one of the theories upon which the jury could convict was not supported by any evidence offered at trial.

Defendant was convicted of four felonies under N.C. Gen. Stat. § 14-27.4(a)(1) (first degree sexual offense with a child) and two felonies under N.C. Gen. Stat. § 14-27.7(a) (sex offense in a parental role). Both statutes require that a jury find that a defendant engaged in a "sexual act" with the victim. N.C. Gen. Stat. § 14-27.4 (2013); N.C. Gen. Stat. § 14-27.7 (2013). "Sexual act" is defined by the General Assembly as "cunnilingus, fellatio, analingus, or anal intercourse." N.C. Gen. Stat. § 14-27.1(4) (2013).

At trial, the State's evidence tended to show that Defendant engaged in fellatio and anal intercourse with Chloe. The State did not present any

evidence that Defendant engaged in analingus with Chloe. However, the trial court instructed the jury that it could find Defendant guilty of the six felonies if it found that he committed fellatio, anal intercourse, *or analingus* with Chloe.

In our first opinion, we held, based on a line of cases from our Supreme Court, that the trial court's inclusion of "analingus," where there was no evidence of analingus offered at trial, essentially constituted plain error *per se*. In this line of cases, our Supreme Court consistently held that "[w]here the trial court erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence and the other which is, and [] it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990); *see also State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987); *State v. Belton*, 318 N.C. 141, 162-63, 347 S.E.2d 755, 768-69 (1986), *partially overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997).[2] Our Supreme Court has explained that a new trial is required in this case because "we *must assume* the jury based its verdict on the theory for which it received an improper instruction." *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) (emphasis added). And our Supreme Court has stated that such error rises to the level of plain error: "it would be difficult to say that permitting a jury to convict a defendant on a theory not legally available to the State because it is not charged in the indictment or not supported by the evidence is not plain error even under the stringent test required to invoke that doctrine." *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986); *see also State v. Brown*, 312 N.C. 237, 249, 321 S.E.2d 856, 861 (1984).

In the present case, it cannot be discerned from the verdict sheets which theory the jury relied upon to find that Defendant had engaged in sexual acts with Chloe. It could certainly be argued that the trial court's disjunctive instruction allowing the jury to convict based on a finding that Defendant engaged in analingus should not be considered plain error *per se* where there is clear evidence supporting the other theories contained in the instruction. The line of Supreme Court cases

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2. Similar to the present case, this line of cases involves a disjunctive instruction where one of the theories presented to the jury is not supported by the evidence. This line of cases is distinct from another line of Supreme Court cases which addresses a situation where the jury is instructed on different theories but where each theory *is* supported by the evidence. This separate line of cases deals with the issue of jury unanimity. *See State v. Walters*, 368 N.C. 749, 753-54, 782 S.E.2d 505, 507-08 (2016).

cited above, though, compels a plain error determination since we "must assume" that the jury based its verdict on the theory not supported by the evidence. And "[i]t is plain error to allow a jury to convict a defendant upon a theory not supported by the evidence." *State v. Jordan*, 186 N.C. App. 576, 584, 651 S.E.2d 917, 922 (2007). *See also State v. Crabtree*, ___ N.C. App. ___, ___, 790 S.E.2d 709, 717 (2016).

In our first opinion, we essentially concluded that the trial court's disjunctive instruction constituted plain error *per se*, based on the line of Supreme Court cases which includes *Petersilie*, *Lynch*, *Pakulski*, and *Belton*. In our prior opinion, we assumed that the jury based its verdicts on its finding that Defendant committed analingus with Chloe. Thus, based on this presumption, we concluded that plain error occurred when Defendant was convicted based on a finding by the jury not supported by the evidence.

Our Supreme Court, however, has remanded, instructing us to revisit our holding in light of its 2013 holding in *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013), a case not cited by the State in its brief nor considered by our Court in our first opinion. In *Boyd*, our Supreme Court issued a two-line *per curiam* opinion adopting Judge Stroud's dissenting opinion from our Court. We now turn to analyze the trial court's disjunctive instruction in the present case in light of the *Boyd* decision.

In *Boyd*, the trial court instructed the jury that it could convict the defendant of kidnapping on three alternative theories – that the defendant either confined, restrained, or removed the victim. *State v. Boyd*, 222 N.C. App. 160, 163, 730 S.E.2d 193, 196 (2013). On appeal to our Court, two members of the panel held that the instruction constituted plain error, as there was no evidence that the defendant "removed" the victim. *Id.* In her dissent, Judge Stroud agreed with the majority that the trial court erred when it instructed on the theory of "removal," but that she disagreed that the error rose to the level of *plain* error. *Id.* at 167, 730 S.E.2d at 198 ("I believe that the instructional error as to 'removal' does not rise to the level of plain error."). In reaching her conclusion, Judge Stroud did not assume that the jury relied on the theory of removal to support the kidnapping conviction. Rather, Judge Stroud cited the overwhelming evidence supporting the *other* kidnapping theories – confinement and restraint – to conclude that the defendant failed to show "that, absent the error [instructing on removal], the jury would have returned a different verdict." *Id.* at 173, 730 S.E.2d at 201. Judge Stroud cited extensively to *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d

326 (2012), in which our Supreme Court clarified the application of the plain error test by reviewing courts.[3]

The 2013 *Boyd* decision represents a shift away from the *per se* rule that had been applied for a number of decades by our Supreme Court in cases involving disjunctive instructions where one of the theories was not supported by the evidence. Citing *Lawrence*, Judge Stroud did not follow the direction from our Supreme Court in past cases that a reviewing court "must assume" that the jury relied on the improper theory. *See Petersilie*, 334 N.C. at 193, 432 S.E.2d at 846. Rather, under *Boyd*, a reviewing court is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the jury relied on the inappropriate theory.[4]

We have reviewed the record and conclude that Defendant has failed to meet his burden of showing that the trial court's inclusion of "analingus" in the jury instruction had any *probable* impact on the jury's verdict. Chloe was clear in her testimony regarding the occasions where fellatio and anal intercourse had occurred. The case essentially came down to whether the jury believed Chloe's account or Defendant's account. The trial court's inclusion of the word "analingus" (for which there was no evidence) probably had no impact in the jury's deliberations. Therefore, we find no plain error in Defendant's convictions for sex offense with a child and sex offense in a parental role.[5]

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3. In *Lawrence*, our Supreme Court reaffirmed its holding in *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983), regarding the application of the plain error test, stating that the defendant must show that the error had a "probable impact" on the jury's verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Our Supreme Court, however, has relied on *Odom* in the past to conclude that a disjunctive jury instruction which included a theory not supported by the evidence had a "probable impact" on the jury's verdict. *Tucker*, 317 N.C. at 539, 346 S.E.2d at 421.

4. Our Court though, even after the *Boyd* decision in 2013, has continued to find reversible error *per se*. Some recent cases from our Court include *State v. Dick*, 791 S.E.2d 873, *11-12 (2016) (unpublished) (applying harmless error standard); *State v. Jefferies*, ___ N.C. App. ___, ___, 776 S.E.2d 872, 880 (2015); and *State v. Collington*, ___ N.C. App. ___, 775 S.E.2d 926 (2015) (unpublished) (stating that "trial court commits plain error [under Supreme Court precedent] when it instructs a jury on disjunctive theories of a crime, where one of the theories is improper").

5. Defendant also contends that the trial court committed plain error in its jury instructions for sex offense in a parental role, based on the trial court's instruction for both "vaginal intercourse" and "sexual act," where the indictments only alleged that Defendant engaged in a "sexual act" with the victim. We acknowledge that this was error, however, it does not rise to the level of plain error. The cases cited by Defendant in support of this argument are distinguishable. Here, the verdict sheets only allowed the jury to find Defendant guilty if it believed he "engag[ed] in a *sexual act* with a minor", thus rendering any error in the trial court's earlier instructions harmless. *See State v. Fincher*, 309 N.C. 1, 22, 305 S.E.2d 685, 698 (1983).

D. Impeachment Evidence

[4] Finally, Defendant argues that the trial court committed reversible error when it excluded relevant evidence which tended to show Mother's bias against him. On cross-examination, the trial court sustained the State's objections to defense counsel's attempt to elicit testimony from Mother on four different subjects; namely, that Mother (1) had recently discovered Defendant had another girlfriend, (2) was attempting to obtain a "U-visa"[6] to allow her to remain in the United States legally after the trial, (3) was upset that Defendant refused to lend her money, and (4) had previously accused Defendant of domestic violence. On appeal, Defendant contends that the trial court's exclusion of this impeachment evidence constitutes prejudicial error. We conclude that Defendant failed to preserve his challenge as to the first three forms of impeachment evidence; further, we conclude that the exclusion of the fourth form did not constitute prejudicial error.

In order to preserve this issue for appellate review, "the significance of the excluded evidence must be made to appear in the record[.] [A] specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). "[T]he essential content or substance of the witness's testimony must be shown before [the reviewing court] can ascertain whether prejudicial error occurred." *Id.*; *see also State v. Willis*, 285 N.C. 195, 200, 204 S.E.2d 33, 36 (1974) ("The words of the witness . . . should go in the record.").

In this case, the trial court did not hear Mother's responses to Defendant's first three lines of questioning. Defendant contends that statements he made during his testimony and at his sentencing hearing were an "offer of proof;" however, Defendant's speculation as to what the content of Mother's testimony would have been is not sufficient to show the *actual* "content or substance of [Mother's] testimony[.]" *Simpson*, 314 N.C. at 370, 334 S.E.2d at 60. Without her testimony in the record, it is impossible for this Court to determine whether Defendant's arguments have merit. As in *Simpson*, "[w]e fail to discern any reason why defense counsel could not have made an offer of proof by having the [witness] called to the stand in the absence of the jury and questioned about [her responses] . . . ." *Simpson*, 314 N.C. at 371, 334 S.E.2d at 61. Accordingly, Defendant has failed to preserve these issues for our review.

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6. A "U-visa" is a type of visa available to victims of serious crimes who are undocumented immigrants and cooperate with law enforcement in the investigation or prosecution of crimes. 8 U.S.C. § 1101(a)(15(U).

[5] On the fourth line of questioning, however, the State concedes that Defendant did make an offer of proof that Mother had previously accused Defendant of domestic violence. "Although we review a trial court's ruling on the relevance of evidence *de novo*, we give a trial court's relevancy rulings great deference on appeal." *State v. Capers*, 208 N.C. App. 605, 615, 704 S.E.2d 39, 45 (2010) (internal marks omitted).

The record shows that during a bench conference, Defendant's counsel indicated that Mother had accused Defendant of domestic violence, that the police declined to prosecute him, that she subsequently took out a private warrant against Defendant, and that she failed to appear in court to prosecute that warrant. We agree with Defendant that exclusion of this evidence was error. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). Evidence that Mother had accused Defendant of domestic violence could have indicated Mother's bias against Defendant and may have influenced the jury's assessment of her credibility as a witness.

However, considering the entire record of Defendant's trial, we do not believe that there is a reasonable possibility that, had the jury heard evidence regarding Mother's accusation of past domestic violence by Defendant, a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a); *see State v. Turner*, 268 N.C. 225, 232, 150 S.E.2d 406, 411 (1966). Mother offered eyewitness testimony concerning one of the acts of sexual conduct, and Defendant did not contradict her testimony that she saw *something*. Specifically, she stated that, on a single occasion, she discovered Defendant in bed with Chloe and that the covers were "moving up and down." Defendant did not contradict Mother's testimony, but instead offered an innocent explanation of the incident. The remainder of Mother's testimony involved what Chloe had told her about other acts of sexual conduct by Defendant. However, Chloe herself testified at trial regarding the acts of Defendant. And the jury was allowed to view a recording of a prior interview with Chloe and compare it with her testimony at trial. Further, Chloe's brother testified that on several occasions while the children were home alone with Defendant, Defendant would take the infant child and Chloe into the bedroom and lock the door.

In light of the other evidence presented at trial which tended to establish Defendant's guilt, we are unable to conclude that Defendant was prejudiced by the exclusion of the evidence regarding Mother's prior accusation of domestic violence.

III. Conclusion

We find no reversible error in Defendant's convictions.[7]

NO REVERSIBLE ERROR.

Judge BERGER concurs.

Judge BRYANT concurs in the result only, by separate opinion.

BRYANT, Judge, concurring in the result only by separate opinion.

Because I believe the majority overstates the holding of *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993), and because I disagree with the majority's characterization of the dissent adopted by the N.C. Supreme Court in *State v. Boyd*, 222 N.C. App. 160, 730 S.E.2d 193 (2012), *rev'd for the reasons stated in the dissenting opinion*, 336 N.C. 548, 742 S.E.2d 790 (2013) (per curiam), as "a shift away from the *per se* rule . . . in cases involving disjunctive [jury] instructions," I write separately and concur in the result only.

The majority opinion states that a "line of Supreme Court cases[1] compels a plain error determination since we 'must assume' that the jury based its verdict on the theory not supported by the evidence." The majority then proceeds to rationalize the disconnect between what it considers a directive in *Petersilie*, *see* 334 N.C. at 193, 432 S.E.2d at 846, and our Supreme Court's per curiam opinion in *Boyd*, by deciding that "Judge Stroud did not follow the instruction from our Supreme Court in past cases that a reviewing court 'must assume' that the jury relied on the improper theory." It is the majority's conclusion that there was a directive from the Supreme Court in *Petersilie* and the majority's overreliance on the words "we must assume" that compels me to write separately.

In *Petersilie*, the "[d]efendant was convicted of eleven counts of publishing unsigned materials about a candidate for public office—all misdemeanors in violation of N.C.G.S. § 163-274(7)." 334 N.C. at 172, 432 S.E.2d at 834. On appeal, the defendant argued, *inter alia*, that "the trial

7. Defendant also submitted a petition for writ of *certiorari* to this Court for review of the trial court's order requiring him to register as a sex offender and enroll in satellite-based monitoring ("SBM"). We exercise our discretion pursuant to N.C. R. App. P. 21(a)(1) to consider Defendant's argument on this point. However, because we have left Defendant's convictions undisturbed, we affirm the trial court's order in this regard.

1. *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 846 (1993); *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986); *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984).

court committed reversible error by incorrectly defining the essential elements of the statute [N.C.G.S. § 163-274(7)] in its instructions to the jury." *Id.* at 191, 432 S.E.2d at 845. Specifically, the defendant argued "the trial court erroneously included a scienter requirement while no such requirement is present in the statute." *Id.*

Our Supreme Court agreed, holding "that the trial court committed reversible error by *incorrectly stating the law* in its jury instructions[,]" *id.* at 172, 432 S.E.2d at 834 (emphasis added), and granting the defendant a new trial because the erroneous instruction was "*to defendant's prejudice* . . . ," *id.* at 192, 432 S.E.2d at 845 (emphasis added). In other words, the trial court incorrectly stated the law by adding to its jury instruction an intent requirement not present in the statute, and which the jury was required to find beyond a reasonable doubt for each of the eleven counts charged. *Id.* at 191, 432 S.E.2d at 845 ("Section 163-274(7) requires that the jury find beyond a reasonable doubt that [the] defendant published 'a charge derogatory to a candidate or calculated to affect the candidate's chances of nomination or election.' For all eleven counts against [the] defendant the trial court instructed the jury that it must find beyond a reasonable doubt that [the] defendant published: a charge *he intended* to be derogatory to a candidate for election . . . or which he calculated would affect such candidate's chances of election . . . .").

In finding that the trial court incorrectly stated the law to the defendant's prejudice, the Supreme Court in *Petersilie* reasoned as follows:

> "When [the trial court] undertakes to define the law, [it] must state it correctly." *State v. Earnhardt*, 307 N.C. 62, 70, 296 S.E.2d 649, 654 (1982). Failure to do so may be prejudicial error sufficient to warrant a new trial. *Id.* . . . .
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> . . . [W]e believe the incorrect instruction was "too prejudicial to be hidden by the familiar rule that the charge *must be considered contextually as a whole*." *Id.* . . .
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> . . . .
>
> Because the trial court incorrectly instructed the jury regarding one of two possible theories upon which [the] defendant could be convicted and it is unclear upon which theory or theories the jury relied in arriving at its verdict, we must assume the jury based its verdict on the theory for which it received an improper instruction.

Id. at 192–93, 432 S.E.2d at 845–46 (emphasis added) (citations omitted).

Notably, the defendant in *Petersilie* objected at trial to the jury instruction as given, and thus, the standard of review on appeal was not the plain error standard, which is applicable in the instant case as it also was in *Boyd*. *See* 220 N.C. App. at 168, 730 S.E.2d at 198 (Stroud, J., dissenting) ("Because defendant did not object at trial, we review for plain error." (citation omitted)). Although not explicitly enunciated in *Petersilie*, the standard of review for jury instructions where the defendant objected at trial is a question of law reviewed *de novo*, *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) (citation omitted), with the caveat that "an error in jury instruction is *prejudicial* and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . .' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (emphasis added) (citation omitted) (quoting N.C. Gen. Stat. § 15A-1443(a)); *see Petersilie*, 334 N.C. at ___, 432 S.E.2d at 845 ("Failure to [instruct correctly on the law] *may be* prejudicial error sufficient to warrant a new trial." (emphasis added) (citation omitted)). Therefore, there is not—nor has there ever been—a *per se* rule involving disjunctive jury instructions. Recently, our Supreme Court in *State v. Walters*, 368 N.C. 749, 782 S.E.2d 505 (2016), noted that "our case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense." *Id.* at 753, 782 S.E.2d at 507 (citing *State v. Bell*, 359 N.C. 1, 29–30, 603 S.E.2d 93, 112–13 (2004)); *see also infra* note 2.

While the discussion in *Walters* ultimately addressed unanimity of jury verdicts, contrary to the majority's assertion in footnote 2, such discussion is helpful to the instant case. *See* Maj. Op. at 8 n.2 (citing *Walters*, 368 N.C. at 753–54, 782 S.E.2d at 507–08) (stating that cases that deal with the issue of jury unanimity are "distinct from" and constitute a "separate line of Supreme Court cases" than those that address the issue of disjunctive jury instructions). However, the two lines of cases set forth and described in *Walters*—and which "cases have developed regarding the use of disjunctive jury instructions"—actually inform our analysis here. *See* 368 N.C. at 753, 782 S.E.2d at 507 (quoting *Bell*, 359 N.C. at 29, 603 S.E.2d at 112).

The first line of cases concerns jury instructions, like those in *Petersilie*, where the Court found the trial court's incorrect statement on the law in its jury instruction to be so prejudicial as to entitle the defendant to a new trial. *See* 334 N.C. at 193, 196, 432 S.E.2d at 846, 848. The

second line of cases concern jury instructions like we have in the instant case—where the trial court's instructions on "one or more specific acts, any of which could establish an essential element of the offense" were listed, but were not supported by the evidence. *See State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180–81 (1990) (noting that "the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts" and holding that "[t]he jury found [the] defendant guilty of committing indecent liberties upon his stepson after the trial judge correctly instructed it that it could find the immoral, improper, or indecent liberty upon a finding that [the] defendant either improperly touched the boy or induced the boy to touch him").[2] "In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct." *Walters*, 368 N.C. at 753, 782 S.E.2d at 508 (quoting *Bell*, 359 N.C. at 29–30, 603 S.E.2d at 112–13).

Under the plain error standard, under which this Court has been explicitly directed to review this issue by the Supreme Court, *see Boyd*, 366 N.C. 548, 742 S.E.2d 789, "[t]o establish plain error, defendant must show that the erroneous jury instruction was a fundamental error—that the error had a *probable impact* on the jury verdict." *Boyd*, 222 N.C. App. at 167, 730 S.E.2d at 198–99 (Stroud, J., dissenting) (emphasis added).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish *prejudice* that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. at 168, 730 S.E.2d at 198 (emphasis added) (citations omitted) (quoting *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)).

In *Boyd*, which involved a jury instruction on kidnapping, the trial court erroneously included in its instruction a reference to "removal" as a (disjunctive) theory of the kidnapping charge. *Id.* at 169, 730 S.E.2d at

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2. Further, it seems to me that if unanimity is satisfied from disjunctive instructions as to alternative acts—even one or more not supported by the evidence—from a constitutional perspective, a disjunctive instruction that is challenged simply because an alternative theory is not supported by the evidence cannot be prejudicial and therefore cannot constitute plain error.

199. Because there was "overwhelming" evidence against the defendant, much of which "was uncontroverted," *see id.* at 170, 730 S.E.2d at 199, the dissent, with whom the Supreme Court agreed, reasoned as follows: "The omission of approximately ten words relating to 'removal' from the above jury instructions would, under the facts of this particular case, make no difference in the result. Therefore, I would find no plain error as to the trial court's instructions as to second-degree kidnapping." *Id.* at 173, 730 S.E.2d at 201.

In the instant case, the jury instructions the trial court gave relating to the six charges of "sexual offense with a child" read "contextually as a whole," *see Petersilie*, 334 N.C. at 192, 432 S.E.2d at 846 (citation omitted), as follows:

> The defendant has been charged with two counts of sexual offense with a child. For you to find the defendant guilty of both of these counts on this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that the defendant engaged in a sexual act with the alleged victim. A sexual act means fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another; or analingus, which is any touching by the lips or tongue of one person and the anus of another; or anal intercourse, which is any penetration, however slight, of the anus of any person by the male sexual organ of another.[3]

The trial court erroneously included in its instruction the description of analingus where the State presented no evidence of analingus at trial. However, there was overwhelming evidence in the instant case that other sex offenses—fellatio and anal intercourse—had occurred.[4] Furthermore, as the standard of review in the instant case is plain error, *Petersilie* does not, in fact, require that "we must assume the jury based its verdict on the theory for which it received an improper instruction,"

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3. The trial court's instruction quoted above in reference to two counts of sexual offense with a child was (for our purposes) identical to the instruction given for the four counts of "feloniously engaging in a sexual act with a minor over whom defendant had assumed a position of a parent residing in the home."

4. It is also worth noting that the nature of the erroneous instruction in *Petersilie* is fundamentally different from the nature of the error in the instant case. In *Petersilie*, the trial court, in misstating the law, essentially created an alternate theory under which the jury could find the defendant guilty, a theory not enumerated in or contemplated by the statute. *See* 334 N.C. at 192–93, 432 S.E.2d at 845–46. In the instant case, the trial court did

see id. at 193, 432 S.E.2d at 846 (citations omitted), especially where, as here, defendant cannot show that the error was prejudicial after considering the jury charge "contextually as a whole." *See id.* at 192, 432 S.E.2d at 846 (citation omitted).

For the forgoing reasons, I concur in the result only.

STATE OF NORTH CAROLINA
v.
DANNY WAYNE POWELL, JR.

No. COA16-1022

Filed 16 May 2017

1. Appeal and Error—preservation of issues—express plain error argument in brief

An issue concerning firearms seized during a search of defendant's home was properly preserved for appeal where defendant expressly made a plain error argument in his appellate brief.

2. Search and Seizure—search of parolee's home—parole officer present—not for purposes of parole

On the specific facts of this case, there was plain error where the trial court denied a parolee's motion to suppress firearms seized from his house by a violent crime task force of U.S. Marshals accompanied by two parole officers (but not defendant's parole officer). N.C.G.S. § 15A-1343(b)(13) has been amended to require that warrantless searches by a probation officer be for purposes directly related to probation supervision. The evidence presented by the State was simply insufficient to satisfy the requirements of the statute.

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not erroneously instruct the jury by creating an element or listing an act which the jury could consider a sex offense which was not listed in the statute; analingus is specifically enumerated as a "sexual act." *See* N.C. Gen. Stat. § 14-27.1(4) (2013) (" 'Sexual act' means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse."), *recodified as* N.C. Gen. Stat. § 14-27.20(4) (2015), by N.C. Sess. Laws 2015-181, § 2, eff. Dec. 1, 2015.

3. Search and Seizure—denial of motion to suppress—plain error

Where the trial court erroneously denied defendant's motion to suppress firearms seized in a search of his house, the error had a probable effect on the jury's decision to convict defendant of possession of a firearm by a felon and amounted to plain error. Without this evidence, there would have been no evidence of criminal conduct.

Appeal by defendant from judgment entered 14 December 2015 by Judge Richard D. Boner in Catawba County Superior Court. Heard in the Court of Appeals 4 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General James D. Concepcion and Assistant Attorney General Sherri Horner Lawrence, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

DAVIS, Judge.

This case requires us to determine whether a warrantless search of a probationer's home was "directly related" to the supervision of his probation as required by N.C. Gen. Stat. § 15A-1343(b)(13). Danny Wayne Powell, Jr. ("Defendant") appeals from his conviction for possession of a firearm by a felon and argues that the trial court erred in denying his motion to suppress evidence found during a search of his residence. Because the State failed to meet its burden of demonstrating that the warrantless search was authorized by N.C. Gen. Stat. § 15A-1343(b)(13), we reverse the trial court's order denying Defendant's motion to suppress and vacate his conviction.

Factual and Procedural Background

On 23 September 2013, Defendant was convicted of felony breaking or entering and sentenced to 6 to 17 months imprisonment. This sentence was suspended, and he was placed on supervised probation for 30 months. At all times relevant to this appeal, he was living in Catawba County.

In March of 2015, Officers Sarah Lackey and Travis Osborne were Probation and Parole officers in Catawba County employed by the North Carolina Department of Public Safety. On 4 March 2015, Officers Lackey and Osborne "were conducting an operation with the U.S. Marshal's task

force service." They were working with Investigator Gary Blackwood of the Street Crime Interdiction and Gang Unit of the Hickory Police Department, Officer Jamie Carey of the North Carolina Department of Public Safety, and "two or three . . . U.S. Marshals." These officers were "part of [an] operation" conducting searches of "seven or eight" residences of individuals who were on probation, parole, or post-release supervision in a particular geographic area of Catawba County. The members of the task force utilized a list of probationers provided by the supervisor of Officers Lackey and Osborne. Although Officer Lackey testified at trial that "[t]he list . . . was targeting violent offenses involving firearms [and] drugs[,]" she acknowledged during the suppression hearing that "not all offenders that were selected had that criteria." Defendant's name, address, and status as a probationer was contained on the list provided to the task force. Neither Officer Lackey nor Officer Osborne was the probation officer assigned to Defendant.

At approximately 9:30 p.m. that night, the officers arrived at Defendant's residence. Officer Osborne knocked on the front door while Investigator Blackwood and another officer went to the back corner of the house to ensure that no one exited the residence. When Defendant answered the door, Officer Osborne asked him if he was Danny Powell, and Defendant responded affirmatively. Officer Osborne then placed Defendant in handcuffs and directed him to sit down at the kitchen table. Defendant's wife — who was eight months pregnant at the time — also remained in the kitchen along with Defendant's father.

Officer Osborne asked if there were any firearms in the house, and Defendant's wife responded that there was a firearm in the bedroom closet. Officer Osborne remained with Defendant in the kitchen while the other officers went to retrieve the firearm.

While searching the bedroom closet upstairs, Investigator Blackwood found a Mossberg twelve-gauge shotgun and a Mossberg .22 caliber rifle contained in "gun cases or gun sleeves" and determined that the guns were not loaded. He testified that it "was a walk-in type closet . . . [and] the guns were on the right-hand side against the wall. There was [sic] some clothing items kind of up against them." He stated that the clothes in front of the guns were "[m]en's clothing" but there were also "female clothing, shoes, . . . [and] male shoes" in the closet.

Investigator Blackwood seized the weapons, and Defendant was placed under arrest. On 18 May 2015, he was indicted by a grand jury for possession of a firearm by a felon.

A jury trial was held on 23 September 2015 before the Honorable Patrice Hinnant in Catawba County Superior Court. On the morning of trial, Defendant filed a motion to suppress evidence of the firearms seized from his residence, arguing that the officers' search of his home violated his rights under the Fourth Amendment to the United States Constitution as well as N.C. Gen. Stat. § 15A-1343(b)(13). At the hearing on the motion to suppress, Officer Lackey, Officer Osborne, and Investigator Blackwood testified about their search of Defendant's home. The trial court orally denied Defendant's motion.

At trial, the State presented testimony from Officer Lackey, Officer Osborne, and Investigator Blackwood. Defendant and his wife testified for the defense. The jury found Defendant guilty of possession of a firearm by a felon.

On 14 December 2015, the trial court sentenced Defendant to 12 to 24 months imprisonment. The court also revoked Defendant's probation and activated his sentence from his prior conviction of felony breaking or entering. Defendant gave oral notice of appeal.

Analysis

Defendant's primary argument on appeal is that the trial court erred by denying his motion to suppress. Specifically, he contends the State failed to demonstrate that the evidence offered against him at trial was obtained by means of a lawful warrantless search.

[1] As an initial matter, we must determine whether this issue was properly preserved for appeal. Defendant acknowledges that although he filed a motion to suppress evidence of the firearms seized from his home, he failed to renew his objection when the State sought to admit the evidence at trial. Our Supreme Court has explained that

> [t]o preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial. [Defendant's] failure to object at trial waived his right to have this issue reviewed on appeal.

State v. Golphin, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (internal citations omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Accordingly, Defendant failed to properly preserve this issue for appellate review.

However, our Supreme Court has held that "to the extent [a] defendant fail[s] to preserve issues relating to [his] motion to suppress, we review for plain error" if the defendant "specifically and distinctly assign[s] plain error" on appeal. *State v. Waring*, 364 N.C. 443, 468, 508, 701 S.E.2d 615, 632, 656 (2010), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d. 53 (2011). Because Defendant has expressly made a plain error argument in his appellate brief, we review his argument under this standard.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

[2] In conducting our review for plain error, we must first determine whether the trial court did, in fact, err in denying Defendant's motion to suppress. *See State v. Oxendine*, __ N.C. App. __, __, 783 S.E.2d 286, 292 ("The first step under plain error review is . . . to determine whether any error occurred at all."), *disc. review denied*, __ N.C. __, 787 S.E.2d 24 (2016).

The State contends that the warrantless search of Defendant's home was authorized by N.C. Gen. Stat. § 15A-1343(b)(13), which states as follows:

> (b) Regular Conditions. -- As regular conditions of probation, a defendant must:
>
> . . . .
>
> (13) Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, *for purposes directly related to the probation supervision*, but the probationer may not be required to submit to any other search that would otherwise be unlawful.

N.C. Gen. Stat. § 15A-1343(b) (2015) (emphasis added).

Normally, "[t]he standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (citation and quotation marks omitted). Here, however, the trial court summarily denied Defendant's motion to suppress without making any findings of fact or conclusions of law.

N.C. Gen. Stat. § 15A-977 states that when ruling on a motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977 (2015). However, despite this statutory directive, our Supreme Court has held that "only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling. When there is no conflict in the evidence, the trial court's findings can be inferred from its decision." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (internal citations omitted).[1]

At a suppression hearing, "the burden is upon the state to demonstrate the admissibility of the challenged evidence[.]" *State v. Cheek*, 307 N.C. 552, 556-57, 299 S.E.2d 633, 636 (1983) (citation omitted). Here, as noted above, the testimony relied upon by the State at the suppression hearing came from three of the officers who participated in the search of Defendant's home. Therefore, the State's contention that the search was lawful under N.C. Gen. Stat. § 15A-1343(b)(13) hinges on the adequacy of the officers' testimony regarding the purpose of the 4 March 2015 search. For this reason, it is necessary to carefully review their testimony on this issue.

Officer Lackey testified, in pertinent part, as follows:

> [PROSECUTOR:] And for what purpose on March 4th did you go to the defendant's residence?
>
> [OFFICER LACKEY:] We were conducting a warrantless search of his residence with the U.S. Marshal's task force.

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1. We take this opportunity to reiterate, however, that even in cases where there is no material conflict in the evidence presented, "findings of fact are preferred." *State v. Norman*, 100 N.C. App. 660, 663, 397 S.E.2d 647, 649 (1990) (citation omitted), *disc. review denied*, 328 N.C. 273, 400 S.E.2d 459 (1991).

[PROSECUTOR:] And other than Officer Osborne and Officer Blackwood who else was with you?

[OFFICER LACKEY:] Task force officer Jamie Carey, who is also employed with the North Carolina Department of Public Safety, as well as to my knowledge, two or three other U.S. Marshals.

. . . .

[DEFENSE COUNSEL:] Officer Lackey, are you or were you [Defendant]'s supervising officer?

[OFFICER LACKEY:] I am not.

[DEFENSE COUNSEL:] Was Mr. Osborne the supervising officer?

[OFFICER LACKEY:] No.

[DEFENSE COUNSEL:] How was the determination made to search [Defendant]'s residence that evening?

[OFFICER LACKEY:] Part of the operation we were conducting with the U.S. Marshal's task force, Officer Osborne and I were assigned to a specific area of the county. And he was one of the offenders in the area of the county that we were asked to search.

[DEFENSE COUNSEL:] Who asked you to search?

[OFFICER LACKEY:] Our supervisor.

[DEFENSE COUNSEL:] Does your supervisor also work for the U.S. Marshal's Service?

[OFFICER LACKEY:] No, she does not.

[DEFENSE COUNSEL:] Did anybody in your office tell you that he was being searched for any particular reasons?

[OFFICER LACKEY:] Not any particular reason.

[DEFENSE COUNSEL:] Did you or any of the other people that entered the home that evening tell [Defendant] and [Defendant's wife] that you were conducting a random search?

[OFFICER LACKEY:] Yes.

. . . .

[DEFENSE COUNSEL:] How many people entered the home?

[OFFICER LACKEY:] Let's see, it was myself, Officer Osborne, Officer Terry, Investigator Blackwood, and approximately two, three, maybe four U.S. Marshal officers.

. . . .

[DEFENSE COUNSEL:] Are you aware of any complaints about [Defendant], and any illegal activity, contraband he might have had, any reason to have gone to his house other than just a random search?

[OFFICER LACKEY:] No, sir.

. . . .

COURT: So, this was basically a list of persons that were on a special task force list to search if they were on probation, or was probation included as a reason for a condition of the search?

[OFFICER LACKEY]: It was offenders directly on probation or post release. There were some that were selected because they were gang members, but not all offenders that were selected had that criteria. It was also a random selection of offenders as well.

COURT: And this was a list created by federal law enforcement?

[OFFICER LACKEY]: No, it was created by the supervisors in our district to provide to the task force as a guide to go by for searches.

. . . .

[DEFENSE COUNSEL:] Has there ever been any indication whatsoever that [Defendant] and [Defendant's wife], or anybody there was such [sic] member of a gang, or had any gang activity?

[OFFICER LACKEY:] No, sir.

[DEFENSE COUNSEL:] Did you ever speak with [Defendant]'s probation officer to find out whether or not she had any suspicions of any kind of illegal activity, or anything contrary to his probation?

[OFFICER LACKEY:] No, sir.

Officer Osborne's testimony consisted of the following with regard to this issue:

[PROSECUTOR:] And Officer Osborne, for what purpose were you at the defendant's residence that evening?

[OFFICER OSBORNE:] To conduct a warrantless search.

[PROSECUTOR:] And . . . back in March of this year [Defendant] was on probation for a felony conviction arising out of Burke County, isn't that correct?

[OFFICER OSBORNE:] That's correct.

[PROSECUTOR:] And part of his probationary requirements was that he would be subject to warrantless searches and seizures, isn't that correct?

[OFFICER OSBORNE:] Yes, sir.

[PROSECUTOR:] And part of his probation was that while on probation as a convicted felon he would not be able to own firearms or be in the care, custody, and control of firearms, or be around firearms, is that not correct, Officer?

[OFFICER OSBORNE:] That's correct.

[PROSECUTOR:] Okay. Now, you and Officer Lackey were present during this search, is that correct?

[OFFICER OSBORNE:] That's correct.

[PROSECUTOR:] And Officer Blackwood was present during this search, correct?

[OFFICER OSBORNE:] Yes, sir.

. . . .

[DEFENSE COUNSEL:] You're not [Defendant]'s supervising officer are you?

[OFFICER OSBORNE:] I am not.

[DEFENSE COUNSEL:] And you weren't at the time, were you?

[OFFICER OSBORNE:] Was not.

Finally, Investigator Blackwood testified, in pertinent part, as follows:

[PROSECUTOR:] And for what purpose were you accompanying the probation officers?

[INVESTIGATOR BLACKWOOD:] To assist in a search of the residence for any illegal contraband and weapons.

. . . .

[DEFENSE COUNSEL:] Has there ever been any indication whatsoever that [Defendant] and [his wife], or anybody there was such [sic] member of a gang, or had any gang activity?

[INVESTIGATOR BLACKWOOD:] No, sir.

[DEFENSE COUNSEL:] Did you ever speak with [Defendant]'s probation officer to find out whether or not she had any suspicions of any kind of illegal activity, or anything contrary to his probation?

[INVESTIGATOR BLACKWOOD:] No, sir.

The North Carolina General Assembly amended N.C. Gen. Stat. § 15A-1343(b)(13) on 30 July 2009. Prior to the amendment, subsection (b)(13) stated, in pertinent part, that a warrantless search of a probationer by a probation officer must be "*reasonably related* to his or her probation supervision[.]" 2009 N.C. Sess. Laws 667, 672, 673, ch. 372, §§ 9.(a), 9.(b) (emphasis added) (codified at N.C. Gen. Stat. § 15A-1343(b)(13) (2015)). However, by virtue of the 2009 amendment, this portion of subsection (b)(13) was changed to require that warrantless searches by a probation officer be "for purposes *directly related* to the probation supervision[.]" *See id.* (emphasis added).

The General Assembly did not define the phrase "directly related" in its 2009 amendment to N.C. Gen. Stat. § 15A-1343(b)(13). It is well established that where words contained in a statute are not defined therein, it is appropriate to examine the plain meaning of the words in question absent any indication that the legislature intended for a technical definition to be applied. *See State v. Arnold*, 147 N.C. App. 670,

674, 557 S.E.2d 119, 122 (2001) ("Words undefined in the statute should be given their plain and ordinary meaning." (citation omitted)), *aff'd per curiam*, 356 N.C. 291, 569 S.E.2d 648 (2002); *Sharpe v. Worland*, 137 N.C. App. 82, 88, 527 S.E.2d 75, 79 (2000) ("Where the General Statutes fail to provide a definition of a term, it is appropriate to turn for guidance to dictionaries." (citations omitted)), *disc. review denied*, 352 N.C. 150, 544 S.E.2d 228 (2000).

The word "directly" has been defined as "in unmistakable terms." Webster's Third New International Dictionary 641 (1966). "Reasonable" is defined, in pertinent part, as "being or remaining within the bounds of reason." *Id.* at 1892. "When the General Assembly amends a statute, the presumption is that the legislature intended to change the law." *State v. White*, 162 N.C. App. 183, 189, 590 S.E.2d 448, 452 (2004) (citation and quotation marks omitted). Thus, we infer that by amending subsection (b)(13) in this fashion, the General Assembly intended to impose a *higher* burden on the State in attempting to justify a warrantless search of a probationer's home than that existing under the former language of this statutory provision.

Although all of our prior caselaw evaluating warrantless searches conducted pursuant to N.C. Gen. Stat. § 15A-1343(b)(13) applies the version of this statutory provision in effect prior to the 2009 statutory amendment, it is nevertheless helpful to review these decisions. In *State v. McCoy*, 45 N.C. App. 686, 263 S.E.2d 801, *appeal dismissed and disc. review denied*, 300 N.C. 377, 267 S.E.2d 681 (1980), this Court stated that "the United States Constitution is not violated by the requirement that a probationer submit to warrantless searches as a condition of probation. The courts of North Carolina and of other states, have approved of this condition." *Id.* at 690, 263 S.E.2d at 804 (citations omitted). We reasoned that "[a]s a condition to probation, defendant had waived his right to be free from warrantless searches conducted in a lawful manner by his probation officer." *Id.* at 691, 263 S.E.2d at 804-05. We further explained that

> [p]ersons conditionally released to society . . . may have a reduced expectation of privacy, thereby rendering certain intrusions by governmental authorities "reasonable" which otherwise would be invalid under traditional constitutional concepts, at least to the extent that such intrusions are necessitated by legitimate governmental demands. Thus, a probationer who has been granted the privilege of probation on condition that he submit at any

> time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection.
>
> . . . .
>
> The official commentary to G.S. 15A-1343 states: This section specifies a number of conditions of probation, primarily ones that will be used fairly frequently, that may be imposed. The list is meant neither to be exclusive nor to suggest that these conditions should be imposed in all cases. Condition (15),[2] dealing with searches, recognizes that the ability to search a probationer in some instances is an essential element of successful probation. It includes two important limits: (1) only a probation officer, and not a law-enforcement officer, may search the probationer under this condition, and (2) the search may be only for purposes reasonably related to the probation supervision.

Id. at 691-92, 263 S.E.2d at 805 (internal citation, quotation marks, brackets, and formatting omitted and footnote added).

We have since applied this statutory provision on several occasions in the context of evaluating warrantless searches of a probationer's residence. In *State v. Howell*, 51 N.C. App. 507, 277 S.E.2d 112 (1981), the defendant's probation officer received a tip from an informant that the defendant was using drugs. She enlisted the assistance of law enforcement officers to help her conduct a search of the defendant's home, which uncovered the presence of illegal drugs. In moving to suppress the evidence, the defendant argued that the presence of law enforcement officers during the search rendered it unlawful under N.C. Gen. Stat. § 15A-1343(b). *Id.* at 508, 277 S.E.2d at 113.

We disagreed, holding that "[a] probation officer's search as authorized by G.S. 15A-1343(b)(15) is not necessarily invalid due to the presence, or even participation of, police officers in the search." *Id.* at 509, 277 S.E.2d at 114. We noted that "it would have been difficult for [the probation officer] to conduct a useful search of the house described in the record, and keep watch of two individuals at the same time." *Id.* We concluded that "we are not persuaded by defendant's argument that the warrantless search was initiated and accomplished by the police and was therefore unreasonable. Through the testimony of [his probation

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2. The statutory language currently found in subsection (b)(13) that addresses warrantless searches of a probationer's home was formerly contained in subsection (b)(15).

officer] the evidence is sufficient to support the trial court's finding that 'under the circumstances disclosed by this evidence' the search was reasonable." *Id.*

In *State v. Church*, 110 N.C. App. 569, 430 S.E.2d 462 (1993), law enforcement officers contacted the defendant's probation officer after learning that he was in possession of marijuana plants. The probation officer then arrived at the defendant's home and conducted a warrantless search along with law enforcement officers during which the plants were discovered. *Id.* at 573, 430 S.E.2d at 464.

This Court upheld the validity of the search despite the defendant's contention that it was "initiated and conducted by police officers, rather than his probation officer." *Id.* at 576, 430 S.E.2d at 466. We reiterated that "the presence and participation of police officers in a search conducted by a probation officer, pursuant to a condition of probation, does not, standing alone, render the search invalid." *Id.* We explained that the "[e]vidence presented at defendant's hearing tended to establish that the probation officer conducted the search of defendant's premises with the assistance of the officers" and that the purpose of the search was not unlawful. *Id.* (emphasis omitted).

In *State v. Robinson*, 148 N.C. App. 422, 560 S.E.2d 154 (2002), law enforcement officers received an anonymous tip that the defendant was in possession of marijuana at his home. The officers subsequently contacted the defendant's probation officer, and a plan was formed to search the defendant's residence. *Id.* at 424, 560 S.E.2d at 156. When the officers arrived, the probation officer obtained consent from the defendant to search the home at which point the other officers conducted a warrantless search of the premises, leading them to discover and seize marijuana. The defendant was then charged with multiple drug offenses. *Id.* at 425, 560 S.E.2d at 157.

On appeal from the denial of his motion to suppress, the defendant argued that the law enforcement officers had used his probation officer's "authority to search [him] in lieu of obtaining a search warrant, thereby resulting in an attempt by [his probation officer] to gain consent to search Defendant's house which was not in furtherance of the supervisory goals of probation, and was therefore unreasonable under the Fourth Amendment." *Id.* at 428, 560 S.E.2d at 159. We rejected this argument, ruling that because the defendant's probation officer was provided with information that "indicated . . . Defendant was in violation of his probation . . . [i]t clearly furthered the supervisory goals of probation for [the law enforcement officers] to forward this information to [him],

and for [the probation officer] to attempt to investigate this information further by seeking Defendant's consent to a search of the house." *Id.* at 428-29, 560 S.E.2d at 159. Thus, we concluded, "[t]he fact that . . . other officers were in the general area of Defendant's home when [his probation officer] approached him about consenting to a search [did] not affect the legality of [the probation officer's] conduct." *Id.*

We also find instructive the Fourth Circuit's decision in *United States v. Midgette*, 478 F.3d 616, 622 (4th Cir.), *cert. denied*, 551 U.S. 1157, 168 L. Ed. 2d 749 (2007). In that case, the defendant's probation officer was informed by a police officer that the defendant "might be in possession of a firearm." *Id.* at 619. After meeting with the defendant at the probation office, the probation officer determined that "it probably would be a good idea to search [the defendant's] house." *Id.* (quotation marks omitted). The probation officer asked New Bern police officers to assist her in searching the defendant's residence. The officers found firearms, ammunition, and marijuana in the home, and he was indicted for possession of a firearm by a felon. *Id.* at 620. The defendant moved to suppress the evidence seized during the search. The trial court applied N.C. Gen. Stat. § 15A-1343(b) and found that the search of the defendant's home was lawful pursuant to a special condition of his probation requiring him to submit to searches by a probation officer for purposes that were "reasonably related to probation supervision." *Id.* at 618-19.

On appeal, the defendant argued that this special condition of his probation violated the Fourth Amendment because it did not require "any degree of certainty that the probationer actually possesses contraband or that he has violated his probation or the law[.]" *Id.* at 622 (citation and quotation marks omitted). The Fourth Circuit explained the purpose of N.C. Gen. Stat. § 15A-1343 as follows:

> North Carolina has the . . . need to supervise probationers' compliance with the conditions of their probation in order to promote their rehabilitation and protect the public's safety. To satisfy this need, North Carolina authorizes warrantless searches of probationers by probation officers. But North Carolina has narrowly tailored the authorization to fit the State's needs, placing numerous restrictions on warrantless searches. The sentencing judge must specially impose the warrantless search condition, and not all probationers are subject to it; the search must be conducted during a reasonable time; the probationer must be present during the search; the search must be

> conducted for purposes specified by the court in the conditions of probation; and it must be reasonably related to the probationer's supervision. These criteria impose meaningful restrictions, guaranteeing that the searches are justified by the State's "special needs," *not merely its interest in law enforcement.*

Id. at 624 (internal citation omitted and emphasis added).

Here, it is clear from the officers' testimony that the search of Defendant's home occurred as a part of an ongoing operation of a U.S. Marshal's Service task force. At trial, Officer Lackey testified as follows:

> [PROSECUTOR:] And for what purpose were you out and on duty that evening, Officer Lackey?
>
> [OFFICER LACKEY:] We were conducting an operation with the U.S. Marshal's task force service. . . .

Moreover, with regard to the goal of the operation, Officer Osborne testified to the following:

> [DEFENSE COUNSEL:] The search of [Defendant] was not a targeted search, was it? You didn't specifically pick him for a reason?
>
> [OFFICER OSBORNE:] The list that was made to search was *targeting violent offenses* involving firearms, drugs, that was the target of the search.[3]

(Footnote and emphasis added.)

While our prior caselaw interpreting N.C. Gen. Stat. § 15A-1343(b) makes clear that the presence and participation of law enforcement officers does not, by itself, render a warrantless search under the statute unlawful, the State must meet its burden of satisfying the "purpose" element of subsection (b)(13) — a burden that has been rendered more stringent by the 2009 statutory amendment. We are unable to conclude that the State has met that burden here. *See, e.g.*, *United States v. Irons*, No. 7:16-CR-00055-F-1, 2016 U.S. Dist. LEXIS 168844, 2016 WL 7174648 *4 (E.D.N.C. Dec. 7, 2016) (although post-release supervisee was required to submit to warrantless searches for purposes reasonably related to his post-release supervision, the warrantless search of his home was

3. We note that there is no suggestion in the record that Defendant's own probation officer was even notified — much less consulted — regarding the search of Defendant's home.

unlawful where "[i]nstead of the search being supervisory in nature, it was conducted as part of a joint law enforcement initiative referred to as Operation Zero Hour").

Were we to determine that the present search was permissible under N.C. Gen. Stat. § 15A-1343(b)(13), we would essentially be reading the phrase "for purposes directly related to the probation supervision" out of the statute. This we cannot do. *See N.C. Bd. of Exam'rs for Speech Path. v. N.C. State Bd. of Educ.*, 122 N.C. App. 15, 21, 468 S.E.2d 826, 830 (1996) ("Since a legislative body is presumed not to have used superfluous words, our courts must accord meaning, if possible, to every word in a statute."), *aff'd per curiam in part and disc. review improvidently allowed in part*, 345 N.C. 493, 480 S.E.2d 50 (1997). Thus, even assuming the trial court found the testimony of all the testifying officers at the suppression hearing to be credible, the evidence presented by the State was simply insufficient to satisfy the requirements of N.C. Gen. Stat. § 15A-1343(b)(13).

We wish to emphasize that our opinion today should not be construed as diminishing any of the authority conferred upon probation officers by N.C. Gen. Stat. § 15A-1343(b)(13) to conduct warrantless searches of probationers' homes or to utilize the assistance of law enforcement officers in conducting such searches. Rather, we simply hold that on the specific facts of this case the State has failed to meet its burden of demonstrating that the search of Defendant's residence was authorized under this statutory provision.

[3] *Having determined that the motion to suppress was erroneously denied*, we turn to the second step in our plain error review — whether this error had a probable impact on the jury's determination that Defendant was guilty. Here, this prong is easily met. Had Defendant's motion to suppress been granted, no evidence showing criminal conduct on his part would have been obtained, and thus no basis would have existed to prosecute him for the offense for which he was convicted. Therefore, it is clear that the trial court's erroneous denial of Defendant's motion to suppress had a probable impact on the jury's guilty verdict. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, because Defendant has shown the trial court's denial of his motion to suppress amounted to plain error, we reverse the order denying his motion and vacate his conviction.[4]

4. Based on our ruling that the denial of Defendant's motion to suppress constituted plain error, we need not address his remaining arguments on appeal.

Conclusion

For the reasons stated above, we reverse the trial court's order denying Defendant's motion to suppress and vacate his conviction for possession of a firearm by a felon.

REVERSED AND VACATED.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
DARYL WILLIAMS, DEFENDANT

No. COA16-684

Filed 16 May 2017

1. Appeal and Error—preservation of issues—exception noted

An issue concerning evidence of a prior incident and instructions was preserved for appeal where defendant first objected to the evidence prior to jury selection but the trial court deferred its ruling and defendant noted an exception after a voir dire at trial, but did not object and defense counsel did not object at trial before the jury, but renewed the objection during the charge conference.

2. Evidence—prior firearms incident—offered as evidence of knowledge—not admissible

Evidence of a prior incident in which a firearm was found in a vehicle occupied by defendant was not admissible in a prosecution for possession of a firearm by a felon. Here, firearms where found in a vehicle by which defendant was standing with the car keys in his pocket and the State offered the prior incident as evidence that defendant knew of the firearms. The State's assertion depended on an improper character inference.

3. Evidence—prior incident—admitted to show opportunity—abuse of discretion

The trial court abused its discretion in a prosecution for possession of a firearm by a felon by admitting evidence of a prior incident in which a firearm was found in a vehicle occupied by defendant. The State offered the evidence to show opportunity,

but offered only conclusory statements of the connection between the prior incident, opportunity, and possession of a firearm. Any probative value was minimal and was substantially outweighed by the danger of unfair prejudice.

4. Evidence—prior incident—admitted for no proper purpose —prejudicial

There was prejudicial error warranting a new trial in a prosecution for possession of a firearm by a felon where evidence of a prior incident involving a firearm was admitted for no proper purpose. The Court of Appeals was not convinced that the trial court's limiting instruction had a meaningful impact so as to cure the prejudice.

Judge DILLON dissenting.

Appeal by defendant from judgment entered 12 August 2015 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 25 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.

Gilda C. Rodriguez for defendant-appellant.

ELMORE, Judge.

Daryl Williams (defendant) was charged with possession of a firearm by a felon after officers found an AK-47 rifle in the back seat of a vehicle and a Highpoint .380 pistol next to the rear tire on the passenger's side. At trial, the State offered evidence of a prior incident in which officers found a Glock 22 pistol in a different vehicle occupied by defendant. The trial court admitted the evidence to show defendant's knowledge and opportunity to commit the crime charged. At the conclusion of trial, the jury found defendant guilty of possession of a firearm by a felon and he pleaded guilty to attaining habitual felon status.

After his conviction, defendant filed a petition for writ of certiorari, which we allowed. Defendant argues that evidence of the prior incident was not admissible under Rules 404(b) and 403, and that the trial court erred each time it instructed the jury on the limited purpose for which it could consider the evidence. Reviewing for prejudicial error, we hold that the trial court erred in admitting the evidence as circumstantial

proof of defendant's knowledge, and the trial court abused its discretion in admitting the evidence as circumstantial proof of defendant's opportunity to commit the crime charged. We need not address defendant's second argument regarding the court's jury instructions. Defendant is entitled to a new trial.

I. Background

On 30 November 2014 at 1:45 a.m., Officer Kenneth Prevost responded to a "shots fired" call at the Alpha Arms Apartments in Goldsboro. Upon his arrival, he saw defendant and two unidentified men in the parking lot standing near a Crown Victoria. The front passenger's door was open and he saw defendant put something into the vehicle before shutting the door. The two men walked away as Officer Prevost approached but defendant remained standing on the passenger's side of the vehicle.

When Officer Prevost asked defendant if he had heard any gunshots, defendant replied that he had not. Defendant also denied having any weapons on him. Officer Prevost frisked defendant and, after confirming he was unarmed, told defendant he was free to go. As defendant walked away, Officer Prevost shined a flashlight inside the Crown Victoria and observed an AK-47 rifle in the back seat. When he saw the rifle, he ordered defendant to stop and placed him under arrest.

Officer Prevost searched defendant incident to his arrest, finding the keys to the Crown Victoria in his pants pocket. Once backup arrived, the officers proceeded to search the vehicle. Officer Prevost noticed a strong odor of marijuana when he opened the passenger's side door but did not find any marijuana inside the vehicle. The officers did find defendant's debit card, his social security card, and a medication bottle with defendant's name on it. Although the vehicle was not registered to defendant, Officer Prevost testified that he had seen defendant driving it on other occasions.

Along with the rifle in the back seat, the officers found a Highpoint .380 pistol underneath the vehicle, next to the rear tire on the passenger's side. Officer Prevost seized the firearms and secured them in the trunk of his patrol car. No fingerprint analysis was conducted on the rifle or pistol, and no tests were performed to determine if they had been fired that night.

Defendant offered evidence at trial tending to show that he had no knowledge of the rifle and pistol recovered at the scene. Tyrik Joyner testified that he was at the apartment complex on 30 November 2014 with his cousin, Ty'rek Mathis. Joyner was visiting with his "homegirl,"

Shaniqua Johnson, who lived in one of the apartments. Joyner received a call from his uncle who had recently purchased the AK-47 and asked Joyner to hold onto the rifle while he went to the club. His uncle dropped off the rifle and Joyner, having nowhere else to keep it, placed it in the back seat of the unlocked Crown Victoria. He claimed that the vehicle belonged to Johnson, though she let other people drive it. Joyner testified that no one fired the rifle and the shots he and Mathis heard came from a different direction. Although Joyner had seen defendant walking around the apartment complex earlier that evening, defendant was not at Johnson's apartment and was not present when Joyner placed the rifle in the back seat.

Mathis also testified that he was with Joyner at the apartment complex that night. Mathis was reluctantly carrying a pistol that belonged to another cousin, who had asked Mathis to hold it for him. Mathis and Joyner planned on going to Johnson's apartment that night to drink and play cards but Mathis knew that Johnson would not allow guns in her apartment. He also testified: "I'm not no guy that, you know, walk around with no gun." When he saw Joyner place the rifle in the back seat of the Crown Victoria, Mathis decided he too would leave the pistol underneath the vehicle before heading inside. As far as he knew, the vehicle belonged to Johnson and was driven by Johnson. Mathis testified that he did not see defendant or the police that night. It was only when he left Johnson's apartment later that he realized the pistol was gone.

The issues raised in defendant's petition for writ of certiorari are based upon the admission of Rule 404(b) evidence at trial. Officer Prevost and Sergeant Leanne Rabun testified that they had a previous encounter with defendant on 12 July 2013 (the "prior incident"). They responded to a call to investigate a suspected drug transaction between two men in the parking lot of a strip mall. One had since left the parking lot but the other was seen entering a white SUV. Officer Prevost arrived to conduct a K-9 sniff of the vehicle and saw defendant, the sole occupant, sitting in the driver's seat. The sniff led to a subsequent search of the vehicle in which the officers found a Glock 22 pistol with an extended magazine underneath the driver's seat.

At trial, the State argued that it was not offering the evidence to prove conduct in conformity therewith but as independently relevant circumstantial evidence of motive, knowledge, and identity. Sergeant Rabun testified during *voir dire* that defendant told her he was carrying the Glock 22 because his house had been robbed which, according to the State, was evidence of his motive to carry a firearm for protection.

As to knowledge, the State argued that the prior incident tended to show that defendant knew the rifle and pistol were in and around the Crown Victoria. Finally, the State asserted that the prior incident was relevant to identify defendant as the perpetrator because it shows "that these are his firearms. That's a habit of his *modus operandi* to have firearms."

After *voir dire*, the trial court announced its ruling on the evidence:

> THE COURT: Okay. Court's going to allow that evidence in for limited purpose of basically the fact that the officers were familiar with him; and on a prior occasion, that being July 12, 2013, there was a prior incident which defendant was stopped for suspicion of some crime; and they found him in possession of a firearm, and that's going to be the extent of it.

Although the purpose for which the evidence was initially admitted is not clear, the court subsequently denied the State's request to ask Sergeant Rabun about the reason for which defendant had the Glock 22, indicating that the prior incident was not admitted to show motive.

After Officer Prevost and Sergeant Rabun testified, the trial court instructed the jury that it could only consider the evidence as proof of defendant's knowledge:

> THE COURT: . . . Ladies and Gentlemen, the Court is going to give you a limited instruction regarding prior testimony in this case. Evidence of other crimes is inadmissible if it's only referenced to show the character of the accused.
>
> There are two exceptions, one where a specific mental attitude, state, is an essential element of the crime charged. Evidence may be offered of certain action, declaration of the accused as it tends to establish the requisite mental intent or state even though the evidence disclosed the commission of another offense by the accused. And two, where a guilt[y] knowledge is an essential element of the crime charged. Evidence to be offered of such action and declaration of an accused tend[s] to establish the requisite guilt[y] knowledge even though the evidence reveals commission of another offense by the accused.
>
> Ladies and Gentlemen, the defendant cannot be convicted in this trial for something he has done in the past unless it is an essential element of the charge here.

Later, during the charge conference, the trial court announced for the first time that the evidence could also be considered as proof of defendant's opportunity to commit the crime charged. The court instructed the jury thereafter:

> Evidence that has been received tend[s] to show that that previous encounter, defendant and Officer Prevost, were involved in an incident which involved a firearm, which was detailed as a Glock pistol. This evidence was received solely for showing defendant had *knowledge*, *which is a necessary element of the crime charged in the case*, and that defendant had *opportunity to commit the crime*.
>
> If you believe this evidence, you may consider it, which you will consider it only for the limited purpose which it was received. You may not consider it for any other purpose. Evidence of other crimes is inadmissible if its only relevance is to show the character of the accused. There are exceptions to the rule. They are when specific mental attitude or state is a sentencing element of the crime charged.
>
> Evidence may be offered of such action [ ]or declaration of the accused as they tend to establish mental state even though the evidence discloses the commission of another offense by the accused or where guilt[y] knowledge is an essential element of the crime charged.
>
> Evidence may be offered of such action or declarations of the accused that tends to establish required guilt[y] knowledge; that even though the evidence reveals a commissioned offense by the accused, defendant cannot be convicted in this trial for something he has done in the past, unless it is an element of the charges here.

(Emphasis added.)

II. Discussion

Defendant raises two issues for appellate review. First, defendant argues that testimony of the prior incident was improper character evidence under Rule 404(b) and should have otherwise been excluded under Rule 403. Second, defendant argues that the trial court erred each time it instructed the jury on the limited purpose for which it could consider the evidence.

A. Preservation

[1] Defendant maintains that his trial counsel's objections to the prior incident were sufficient to preserve the first issue for appellate review, citing to this Court's decision in *State v. Randolph*, 224 N.C. App. 521, 527–28, 735 S.E.2d 845, 850–51 (2012) (holding that the defendant preserved issue for appeal where he filed a pre-trial motion to suppress, the trial court deferred ruling until the issue arose at trial, the defendant objected on the same grounds during *voir dire*, but he did not object to the challenged testimony when it was elicited before the jury), *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 392 (2013). Alternatively, defendant contends that the admission of the evidence amounts to plain error. The State argues in response that our review is limited to plain error because defendant failed to raise a timely objection at trial.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure provides in pertinent part: "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2017). "To be timely, an objection to the admission of evidence must be made 'at the time it is actually introduced at trial.' It is insufficient to object only to the presenting party's forecast of the evidence." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (quoting *State v. Thibodeaux*, 352 N.C. 570, 581, 532 S.E.2d 797, 806 (2000)); *see also State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737–38 (2016) (holding that objection outside the presence of the jury was insufficient to preserve the alleged error for appellate review). An unpreserved issue in a criminal case may still be "presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2017).

Defense counsel first objected to evidence of the prior incident before jury selection but the court deferred its ruling until the State offered the evidence at trial. After Officer Prevost testified on direct to the circumstances of his investigation at the Alpha Arms Apartments, the court ordered a recess in anticipation of *voir dire*. Defense counsel briefly reminded the trial court of the basis for his objection and, when the session resumed, the court convened a *voir dire* of Officer Prevost and Sergeant Rabun.

After hearing their testimony concerning the prior incident and the arguments by counsel, the trial court ruled the evidence admissible. At that point, defense counsel requested: "Judge, I would just

note an exception for the record." The trial court responded: "Okay. Exception for the record." Defense counsel failed to object thereafter when Officer Prevost and Sergeant Rabun testified to the prior incident in the presence of the jury but renewed his objection once more during the charge conference.

Based on the exchange between defense counsel and the trial court following *voir dire*, it is understandable that counsel would not feel compelled to renew his objection in the presence of the jury. To the extent that defense counsel relied on the trial court's statement as assurance that a subsequent objection was unnecessary to preserve the issue, it would be fundamentally unfair to fault defendant on appeal—especially since the purpose for which the evidence was admitted was not settled until the charge conference. In light of the circumstances of this case, we review for prejudicial error. *See State v. Kostick*, 233 N.C. App. 62, 67–68, 755 S.E.2d 411, 415–16 (reviewing appeal on the merits where the trial court noted the defendant's "exception" to a pretrial ruling denying his motion to suppress; the defendant's failure to include the jury trial transcript in record on appeal made it impossible to determine whether he renewed his objection at trial; and the State agreed that the "pretrial hearing transcript would be sufficient for purposes of defendant's appeal"), *disc. review denied*, 367 N.C. 508, 758 S.E.2d 872 (2014).

B. Rule 404(b) Evidence

"The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (citation omitted). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2015). Relevant evidence may nevertheless "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2015).

Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* Rule 404(b) has thus been described as a

> general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990); *see also State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852–53 (1995) ("The list of permissible purposes for admission of 'other crimes' evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." (citing *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036 (1988))). "Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002). In furtherance of "these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *Id.* at 154, 567 S.E.2d at 123 (citations omitted).

Whether evidence is "within the coverage of Rule 404(b)" is a legal conclusion reviewed *de novo* on appeal. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Whether relevant evidence passes muster under Rule 403 is a discretionary ruling reviewed for abuse of discretion on appeal. *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. An abuse of discretion occurs "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007) (citing *Wainwright v. Witt*, 469 U.S. 412, 434 (1985)).

1. Knowledge

[2] We first address whether evidence of the prior incident was properly admitted as circumstantial proof of defendant's knowledge. Although knowledge is not an essential element of possession of a firearm by a

felon, *see* N.C. Gen. Stat. § 14-415.1(a) (2015); *State v. Mitchell*, 224 N.C. App. 171, 176–78, 735 S.E.2d 438, 442–44 (2012), defendant's position at trial—that he was not aware of the rifle and pistol—made his guilty knowledge a material fact in issue. The State prosecuted defendant on the theory of constructive possession, which requires that a defendant have "both the power and intent to control [the item's] disposition or use." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "The requirements of power and intent necessarily imply that a defendant must be aware of the [item's] presence . . . if he is to be convicted of possessing it." *State v. Davis*, 20 N.C. App. 191, 192, 201 S.E.2d 61, 62 (1973). Circumstantial evidence that defendant knew of the firearms, therefore, would tend to prove his constructive possession thereof.

The problem with the testimony is that its tendency, if any, to prove knowledge is based almost entirely upon defendant's propensity to commit the crime charged. The State contends that "the discovery of firearms in vehicles controlled by the Defendant increases the likelihood that the Defendant was aware of the firearms in and beside the [Crown] Victoria." That is to say, a person who possessed a pistol in the past is more likely to have known about the firearms found on a more recent occasion. Knowledge, in the State's assertion, does not follow logically from the mere fact of prior possession. It flows instead from an intermediate inference, i.e., because defendant possessed a firearm in the past, *he probably did so again*, and therefore knew of the rifle and pistol. *See* David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 6.4.1, at 403–15 (2009).[1]

Absent an intermediate character inference, the fact that defendant, one year prior, was found to be in possession of a different firearm, in a different car, at a different location, during a different type of investigation, does not tend to establish that he was aware of the rifle and pistol in this case. *See id.* § 6.4.2, at 420 ("Of course, a person's mere possession of a firearm on an uncharged occasion, without more, has no meaningful tendency to prove defendant knew of the presence of the firearm on the charged occasion."); *see also id.* ("Only when facts are present linking the two events in time, by circumstances, or in other respects, is it appropriate to admit the evidence to rebut a defense of lack of knowledge."); *cf. State v. Weldon*, 314 N.C. 401, 403–07, 333 S.E.2d 701, 702–05 (1985) (holding that evidence of two similar occasions in

1. *The New Wigmore: Evidence of Other Misconduct and Similar Events* refers to Federal Rule of Evidence 404(b), which is nearly identical to the pertinent provisions of North Carolina Rule of Evidence 404(b) at issue in this case.

which heroin and large sums of cash were found in the defendant's home was admissible to prove guilty knowledge, where the defendant "denied knowing to whom the heroin belonged or how it got into her house" and claimed "she would never knowingly allow anyone to possess drugs on her premises"). Because its relevance was based upon an improper character inference, the trial court erred in admitting the evidence as proof of defendant's knowledge.

2. Opportunity

[3] Next, we address whether evidence of the prior incident was properly admitted to establish defendant's opportunity to commit the crime. Apart from conclusory statements, the State offered no explanation—either at trial or on appeal—of the connection between the prior incident, opportunity, and possession. We can only assume that the evidence was offered to first establish that defendant had access to firearms, leading to the next logical inference that defendant had an opportunity to possess them. The final inference, flowing from defendant's opportunity, might be that defendant possessed the rifle and pistol recovered in this case. *See* 1 Kenneth S. Broun et al., *McCormick on Evidence* § 190, at 761–62 (6th ed. 2006) (describing "opportunity, in the sense of access to or presence at the scene of the crime or in the sense of possessing distinctive or unusual skills or abilities employed in the commission of the crime charged" (footnotes omitted)).[2] Possession was, of course, a material fact in genuine dispute.

The probative value of the prior incident to show opportunity and, ultimately, possession is limited by three principal concerns. First, the jury had to make the connection between possession in the prior incident and access to firearms before establishing the intermediate fact of opportunity. The officers' testimony of the prior incident, however, falls short of explaining how defendant acquired the Glock 22, or of revealing a reliable source of firearms. The shortcoming is understandable, as the State did not initially offer the evidence to show opportunity. Although the connection between prior possession and access is not a challenging one to make, adding another link to the chain of inferences naturally diminishes the probative value of the evidence.

Second, the mere fact that defendant had access to firearms does not place him within a smaller category of potential perpetrators in this case. It was never defendant's contention that, as a convicted felon, he could

2. *McCormick on Evidence* also refers to Federal Rule of Evidence 404(b).

not lawfully purchase firearms and, therefore, had a lesser opportunity to possess them. Proof of defendant's opportunity to possess firearms only establishes his equal footing with a majority of citizens who can purchase and possess firearms freely, and the prior incident does not reveal some special opportunity to possess the particular rifle and pistol recovered in this case. *See* Leonard, *supra*, § 11.2, at 664–65 ("[I]f everyone has access to the means to commit a crime, the evidence either is not relevant or is of negligible probative value to identify Defendant as the perpetrator." (citing 1 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 3:03, at 6 (1998))).

Finally, any tendency the evidence had to show opportunity was superfluous in light of the other—and less prejudicial—evidence at trial. *See State v. Wilkerson*, 148 N.C. App. 310, 327, 559 S.E.2d 5, 16 (Wynn, J. dissenting) ("[T]he existence of other evidence of defendant's intent and knowledge in the instant case greatly reduced the probative value of defendant's prior convictions, while simultaneously increasing their prejudicial effect." (citation omitted)), *rev'd per curiam for the reasons stated in the dissent*, 356 N.C. 418, 571 S.E.2d 583 (2002). Officer Prevost's testimony already established that defendant had an opportunity to possess the rifle and pistol. Defendant was seen standing next to the vehicle before Officer Prevost saw the rifle in the back seat, the keys to the vehicle were found in defendant's pants pocket, and some of his belongings were found inside the vehicle. In fact, the testimony of his own two witnesses would show that defendant had an opportunity to commit the crime charged in that he associated with people who had firearms.

The danger of unfair prejudice, on the other hand, is obvious. Evidence that defendant possessed a pistol on a prior occasion naturally invites the presumption that he did so again. The jury was far more likely to take the intuitive route, inferring possession in this case based on defendant's possession in the prior incident, than it was to follow the strained logic connecting the prior incident to opportunity and, ultimately, possession. *See* Leonard, *supra*, § 6.4.1, at 405–06. The more obvious character inference is, of course, what Rule 404(b) prohibits and what Rule 403 attempts to guard against. *See State v. Carpenter*, 361 N.C. 382, 387–88, 646 S.E.2d 105, 109 (2007) (recognizing a "natural and inevitable tendency . . . to give excessive weight to" evidence of a prior offense "and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge." (citations omitted) (internal quotation marks omitted)); *State v. Johnson*, 317 N.C. 417, 430, 347 S.E.2d

7, 15 (1986) (noting "[t]he dangerous tendency of [Rule 404(b)] evidence to mislead and raise a legally spurious presumption of guilt"); *State v. McClain*, 240 N.C. 171, 176, 81 S.E.2d 364, 368 (1954) ("[E]vidence of other crimes is likely to have a prejudicial effect on the fundamental right of the accused to a fair trial . . . .").

Based on the minimal probative value, if any, that the prior incident had in establishing opportunity and possession in this case, it was certainly and substantially outweighed by the danger of unfair prejudice. While we are mindful that a trial court is not required to make an explicit demonstration of the Rule 403 balancing test, *State v. Mabrey*, 184 N.C. App. 259, 266, 646 S.E.2d 559, 564 (2007), there is some concern whether the court gave Rule 403 the attention it deserved. The court initially ruled the evidence admissible to show that the officers were familiar with defendant and that, on a prior occasion, "they found him in possession of a firearm." It was not until the charge conference that the court announced, without explanation, that the evidence could be considered by the jury to show opportunity. Based on the foregoing, we conclude that the trial court abused its discretion in admitting evidence of the prior incident as proof of defendant's opportunity to commit the crime charged.

3. Prejudice

[4] We further conclude that the trial court's error in admitting the evidence for no proper purpose was prejudicial to the defense and warrants a new trial. *See* N.C. Gen. Stat. § 15A-1443(a) (2015). The circumstances in this case "reveal a distinct risk that the jury may have been led to convict based on evidence of an offense not then before it." *State v. Hembree*, 368 N.C. 2, 14, 770 S.E.2d 77, 86 (2015). The State's evidence of possession may have been sufficient to submit the charge to the jury, *see State v. Hudson*, 206 N.C. App. 482, 489–90, 696 S.E.2d 577, 582–83 (2010), but it was not overwhelming. Apart from the prior incident, the evidence of defendant's guilt was based circumstantially on his proximity to the vehicle and his control thereof. Defendant's evidence, on the other hand, tended to show that, despite any control defendant had over the vehicle, he was not aware of the firearms. *See State v. Hairston*, 156 N.C. App. 202, 205, 576 S.E.2d 121, 123 (2003) (holding that evidence of the "defendant's guilt was conflicting and was not so overwhelming as to make the trial court's error in admitting prior convictions evidence non-prejudicial").

We are also not convinced that the trial court's limiting instructions had a meaningful impact on the jury so as to cure the prejudice. The court

emphasized the use of the evidence to show knowledge, which rested upon an impermissible character inference. In the same context, the court twice instructed the jury that "defendant cannot be convicted for something he has done in the past, unless it is an element of the charges here," referring to the prior incident and defendant's knowledge in this case. In light of the conflicting evidence, the trial court's instructions, and the inherent prejudice associated with improper character evidence, there is a reasonable possibility that, had evidence of the prior incident not been admitted, the jury would have reached a different result.

C. Jury Instructions

As a separate issue on appeal, defendant contends that the trial court erred each time it instructed the jury on the limited purpose for which it could consider evidence of the prior incident. We discussed the court's limiting instructions, *supra*, only to explain the negligible impact that the instructions had in curing the prejudice at trial. Based on our disposition and the unlikelihood that the same instruction will be offered without the evidence, we do not specifically address defendant's argument or the preservation thereof. *See Hairston*, 156 N.C. App. at 205, 576 S.E.2d at 123.

III. Conclusion

The trial court erred in admitting evidence of the prior incident to show defendant's knowledge and opportunity to commit the crime charged. There is a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different result. Defendant is entitled to a new trial.

NEW TRIAL.

Judge ZACHARY concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

On appeal, Defendant argues that the trial court erred in admitting certain testimony from a State witness. The jurisprudence from our Supreme Court compels us to conclude that Defendant did not properly preserve his objection to this testimony. Accordingly, I disagree with the majority and believe that we should review the alleged error for plain error. Further, I do not believe that the admission of the challenged testimony amounted to plain error.

In the present case, the trial court conducted a *voir dire* of the proposed testimony outside the presence of the jury. After hearing the testimony, the trial court indicated that it would admit the evidence. Defendant's counsel noted an exception for the record, which the trial court acknowledged. The jury was then called back in, and the State offered the testimony into evidence. However, when the State offered the testimony in the presence of the jury, Defendant's counsel did not object.

Our Supreme Court has held that a defendant who objects during a forecast of evidence outside the presence of the jury does not preserve the objection *unless he objects when the testimony is offered into evidence in the jury's presence*:

> Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. To be timely, an objection to the admission of evidence *must be made* at the time it is actually introduced at trial. It is insufficient to object only to the presenting party's forecast of the evidence. As such, in order to preserve for appellate review a trial court's decision to admit testimony, *objections to that testimony must be contemporaneous with the time such testimony is offered into evidence and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony.*

State v. Ray, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citations and internal marks omitted) (emphasis added).

Much like in the present case, in Ray, the trial court excused the jury while it conducted a *voir dire* of a line of questioning that the State wanted to pursue during its cross-examination of the defendant. The defendant's counsel objected to the line of questioning during the *voir dire* but failed to renew the objection when the evidence was offered in the presence of the jury. *Id.* at 276, 697 S.E.2d at 321. The Supreme Court held that the defendant did not preserve the objection; and, therefore, any error could only be reviewed for plain error. *Id.* at 277, 697 S.E.2d at 322. The Supreme Court reaffirmed its holding just last year in *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737-38 (2016).

The majority argues that it would be "fundamentally unfair" to fault Defendant on appeal. I understand the majority's argument.[1] However,

1. The majority relies, in part, on *State v. Randolph*, 224 N.C. App. 521, 735 S.E.2d 845 (2012). *Randolph*, though, does not cite any Supreme Court opinions to support its holding. We are bound to follow Supreme Court precedent until that precedent is overruled,

the Supreme Court has been clear on this point. And we are compelled to follow holdings from our Supreme Court. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Accordingly, I conclude that we must apply plain error.[2]

Turning to the merits of the present appeal, I conclude that, even assuming *arguendo* that the admission of the testimony was error, the error did not amount to plain error. There was sufficient evidence from which a jury could infer that Defendant possessed a weapon. For instance, there was evidence that he was driving the car where one of the weapons was found. *See State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562 (2011) (suggesting that control of the vehicle where weapons are found is sufficient to go to the jury on the issue of constructive possession). Further, an officer testified that he observed Defendant standing on the same side of the car where one weapon was later found lying on the ground under the car. Therefore, I cannot say that the jury "probably" would have reached a different verdict had the challenged testimony not been offered.

Defendant also argues on appeal that the trial court erred in certain portions of its instructions to the jury. The majority does not address this issue, based on its conclusion that the admission of the testimony from the State's witness constituted reversible error. Regarding Defendant's argument concerning the jury instructions, I conclude that, even assuming the instructions were error, the jury "probably" would not have reached a different verdict without those instructions.

In conclusion, I believe that Defendant received a fair trial, free from plain error.

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notwithstanding a contrary opinion from our Court. *See Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008) ("[T]his Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions until otherwise ordered by our Supreme Court." (citations and internal marks omitted)).

2. The majority relies, in part, on the trial judge's statement that Defendant's objection made during *voir dire* was noted in the record. However, the trial court did not offer its legal opinion that the objection was sufficient to preserve it for appellate review. And it is evident that the trial judges in *Ray* and *Snead* also allowed the objections made during voir dire to be part of the record, as our Supreme Court references those objections in its opinions. *See Ray*, 364 N.C. at 276-77, 697 S.E.2d at 321-22; *Snead*, 368 N.C. at 816, 783 S.E.2d at 737-38. However, the fact that the objections were part of the record in those cases did not satisfy the requirement that the record had to show that the objections were renewed when the challenged evidence was offered in the presence of the jury.

WEAVER v. DEDMON

[253 N.C. App. 622 (2017)]

SHAUN WEAVER, EMPLOYEE, PLAINTIFF,
v.
DANIEL GLENN DEDMON D/B/A DAN THE FENCE MAN D/B/A BAYSIDE CONSTRUCTION, EMPLOYER, NONINSURED, AND DANIEL GLENN DEDMON, INDIVIDUALLY; AND SEEGARS FENCE COMPANY, INC. OF ELIZABETH CITY, EMPLOYER, AND BUILDERS MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS.

No. COA16-55

Filed 16 May 2017

1. Workers' Compensation—injury in the course of employment—findings—inconsistent—remanded

The question in a Workers' Compensation case of whether an injury to a forklift driver occurred in the scope of his employment was remanded to the Industrial Commission where the findings were inconsistent, too material to be disregarded as surplusage, and the question could not be resolved by reference to other findings. The injured forklift driver may have been turning donuts when the forklift turned over.

2. Workers' Compensation—findings—use of "may"

In a case remanded on other grounds, the Industrial Commission's use of "may" when finding that plaintiff may have initially performed work-related activities, along with the lack of a finding that plaintiff was credible, left the Court of Appeals to guess what the Commission would have done if it had correctly applied precedent.

3. Workers' Compensation—forklift driver doing donuts—misapprehension of law

In a case decided on another issue, the Court of Appeals pointed out that the Industrial Commission's finding that an injured forklift driver's decision to do donuts constituted an extraordinary deviation from his employment indicated a misapprehension of the law. The finding reflected a legal analysis applicable only to incidental activity not related to the employment.

4. Workers' Compensation—forklift driver—donuts—imputed negligence analysis—erroneous

In a Workers' Compensation case involving a forklift driver injured when the forklift turned over while he was doing donuts, the Industrial Commission acted under a misapprehension of law by grounding its findings in the speed and manner in which plaintiff operated the forklift, appearing to impute negligence, rather than

addressing whether plaintiff operated the forklift in furtherance of his job duties.

Judge TYSON dissenting.

Appeal by Plaintiff from an Opinion and Award entered 2 September 2015 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2016.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr. and Kristina Brown Thompson, for Plaintiff-Appellant.

Lewis & Roberts, by J. Timothy Wilson, for Defendants-Appellees.

INMAN, Judge.

A decision by the North Carolina Industrial Commission that contains contradictory factual findings and misapplies controlling law must be set aside and remanded to the Commission to determine, in light of the correct legal standards, factual and legal issues regarding whether an employee's injury arose out of and in the course of his employment.

Shaun Weaver ("Plaintiff" or "Mr. Weaver") appeals from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission (the "Commission"), denying him compensation for injuries suffered in an on-the-job accident. For the reasons explained in this opinion, we remand.

Factual and Procedural History

Mr. Weaver's appeal arises from an accident that occurred in October 2012 in an outdoor storage yard of Seegars Elizabeth City, a facility owned and operated by Seegars Fence Company ("Defendant Seegars"). Mr. Weaver, at that time 20 years old, was in the yard with Daniel Glenn Dedmon ("Dedmon"), who owned a small business known alternatively as Dan the Fence Man or Bayside Construction.

The record tends to show the following:

A few weeks before the accident, Defendant Seegars had hired Dedmon as a subcontractor in anticipation of a brief period of high-volume contracts for fence construction. Defendant Seegars provided fencing materials as well as a truck and trailer, and Dedmon provided the tools. Dedmon hired Mr. Weaver to do the work. Dedmon directed and

controlled Mr. Weaver's work. Mr. Weaver had worked building fences with Dedmon, the father of Mr. Weaver's half-brother, for a few years.

Defendant Seegars delivered fencing supplies to construction worksites on flatbed trucks. Other supplies were picked up by Dedmon and Mr. Weaver from the Seegars storage yard. After completing their work each day, Dedmon and Mr. Weaver would return to the storage yard, unload unused supplies, and reload supplies needed for the following day. According to Mr. Weaver's testimony, to load and unload supplies, Dedmon regularly operated a Bobcat skid-steer loader kept in the yard and Mr. Weaver regularly operated a forklift kept in a nearby warehouse. Mr. Weaver had no certificate to drive the forklift but testified that he was never told that he was not allowed to operate it. The storage yard is a quarter-acre gravel yard approximately 200 feet behind the warehouse and an adjacent office. A seven-foot fence with privacy slats and barbed wire surrounds the yard.

Between 5:30 and 5:40 p.m. on 17 October 2012, Mr. Weaver and Dedmon returned to the storage yard after finishing their day's work on a construction site. Dedmon operated the Bobcat while Mr. Weaver operated the forklift. At approximately 5:50 p.m., the forklift overturned, entrapping Mr. Weaver between the roll bars of the top portion of the forklift. Mr. Weaver testified that he had completed loading and unloading items with the forklift and was about to return the forklift to the warehouse when he turned it too quickly, causing it to overturn.

Charles Mapes, the owner and operator of a business next door to Seegars who was working about 300 to 350 feet from the storage yard that afternoon, witnessed Mr. Weaver operating the forklift prior to the accident. Mapes heard the loud noise of equipment "running at a high throttle" and looked over the fence to see the forklift being driven in circles or "donuts."[1] Mapes did not see any work materials and "there was no indication that there was any work being done." Mapes turned around to carry some lumber into his building when he heard a loud boom, followed by screaming. Mapes ran over to the yard and found Dedmon trying without success to use the Bobcat to lift the forklift off of Mr. Weaver's body, which was folded in half.

Paramedics arrived at approximately 5:55 p.m., freed Mr. Weaver from the forklift, and transported him to a nearby hospital. Mr. Weaver was

1. The transcript of proceedings before the Commission uses this spelling of the term which most commonly refers to a circular fried dough pastry. "Donut" is the predominant spelling, while "doughnut" is a less common spelling. "Donut." *Merriam-Webster Online Dictionary*. 2017. http://www.merriam-webster.com (19 Apr. 2017).

diagnosed with, *inter alia*, a crush injury; closed head injury; cervical, thoracic, lumbar, and pelvic fractures; liver and renal lacerations; splenic injury; and cardiac arrest. Mr. Weaver required several months of in-patient care and at the time of the hearing of this matter remained in an assisted living facility.

At the time of the accident, Defendant Seegars had workers' compensation insurance. Dedmon had no workers' compensation insurance. Defendant Seegars had not obtained a certificate of workers' compensation insurance coverage from Dedmon prior to the accident.

On 23 October 2012, one week after the accident, Defendant Seegars filed a Form 19 Notice of Accident pursuant to the Workers' Compensation Act. On 5 November 2012, Defendant Seegars's insurance carrier filed a Form 61 Denial of Workers' Compensation Claim explaining that a claim by Mr. Weaver arising from the accident would be denied because "[e]mployee did not sustain an injury by accident or specific traumatic event arising out of and during the course and scope of his employment." On 11 April 2013, Mr. Weaver filed a Form 18 Notice of Injury pursuant to the Workers' Compensation Act. On 20 August 2013, Mr. Weaver filed a Form 33 Request for Hearing.

Mr. Weaver and Defendant Seegars, through counsel, appeared at a hearing on 20 February 2014 before Deputy Commissioner Adrian Phillips. Dedmon did not appear and did not participate in the proceedings below. Following depositions and briefing, the Deputy Commissioner on 7 October 2014 entered an Opinion and Award denying Mr. Weaver's claim in its entirety. The Deputy Commissioner found credible testimony by Mapes that Mr. Weaver was driving the forklift in high-speed turns or "donuts" and found that the turns caused the forklift to tip over onto Mr. Weaver.

Mr. Weaver appealed to the Full North Carolina Industrial Commission pursuant to N.C. Gen. Stat. § 97-85 and Commission Rule 701, and the matter was heard on 10 March 2015. The parties, again with the exception of Dedmon, appeared through counsel and submitted briefs and oral arguments. The Commission entered an Opinion and Award on 6 July 2016 affirming the Deputy Commissioner's Opinion and Award and providing extensive findings of fact and conclusions of law denying Mr. Weaver's claim for compensation. The Commission recited Mr. Weaver's testimony in its findings of fact but did not make a finding that the testimony was credible, or that it was not credible. The Commission found Mapes's testimony—including his account of seeing the forklift doing "donuts"—was credible because he "was an

unbiased, disinterested eyewitness of the events immediately preceding and subsequent to the flipping of the forklift."

The Commission also found credible testimony by an accident reconstruction expert that photographs showing curved tire impressions at the accident scene were consistent with the forklift driving in tight circles. The Commission found that Mr. Weaver "was operating the forklift at such a speed to cause it to rollover and inflict the resulting serious injuries from which [he] now suffers." The Commission further found that "the manner in which Plaintiff operated the forklift preceding his injury was unreasonable and reckless, in essence joy riding and/or thrill seeking." The Commission concluded that Mr. Weaver's injury did not arise out of and in the course of his employment and is therefore not compensable.

Commissioner Bernadine Ballance dissented, asserting that Mr. Weaver was injured while operating the forklift "for the purpose of moving and loading materials needed to accomplish the job for which he was hired," and "in the presence of, at the direction of, and under the supervision of his employer," Dedmon. As the statutory employer, Commissioner Ballance concluded that Defendant Seegars should be liable to the same extent Dedmon would have been if he had purchased workers' compensation insurance. Beyond disputing the Commission's findings based on the evidence, Commissioner Ballance noted that the Commission's finding that Plaintiff was operating the forklift at an excessive or high speed "indicates that Plaintiff may have been negligently operating the forklift" at the time of the accident. Commissioner Ballance reasoned that "neither negligence, nor gross negligence would bar compensation to Plaintiff, if Plaintiff's actions in operating the forklift were reasonably related to the accomplishment of the tasks for which he was hired."

Mr. Weaver timely appealed the Commission's Opinion and Award.

Analysis

[1] Mr. Weaver argues the Commission's legal conclusions are inconsistent with its factual findings and are not supported by the relevant case law. Specifically, Mr. Weaver argues the Commission's findings do not support the legal conclusion that his manner of operating the forklift removed him from the scope of his employment. He also argues that the Commission failed to make findings necessary to support the conclusion that he was injured while engaging in an activity unrelated to the job duties he was performing. After careful review, we agree and remand this matter to the Commission to reconsider and to determine,

based on the North Carolina Workers' Compensation Act and our precedent, whether Mr. Weaver's injuries arose out of and in the course of his employment.

I. *Standard of Review*

Our review of an opinion and award of the Commission is limited to determining: (1) whether the findings of fact are supported by competent evidence, and (2) whether those findings support the Commission's conclusions of law. *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). Unchallenged findings of fact "are 'presumed to be supported by competent evidence' and are, thus 'conclusively established[.]' " *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003)).

The Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted). Challenged findings of fact are conclusive on appeal "when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000). This Court has no authority to re-weigh the evidence or to substitute its view of the facts for those found by the Commission.

Because appellate courts have no jurisdiction to determine issues of fact, errors by the Commission regarding mixed issues of law and fact are generally corrected by remand rather than reversal. "When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citations omitted).

In this appeal, Mr. Weaver challenges some aspects of the Commission's Opinion and Award that are denominated conclusions of law but which actually are findings of fact. Our standard of review depends on the actual nature of the Commission's determination, rather than the label it uses. *Barnette v. Lowe's Home Ctrs., Inc.*, __ N.C. App. __, __, 785 S.E.2d 161, 165 (2016) ("Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review.").

"[T]he determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and this Court may review the record to determine if the findings and conclusions are

supported by sufficient evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Because the amount of deference provided to the Commission by the appellate court can determine the ultimate outcome of an appeal, it is imperative that we take care to apply the appropriate standard of review to each determination in dispute.

II. *"Arising Out of and in the Course of Employment"*

The first issue disputed between the parties is whether Mr. Weaver's injury arose out of and in the course of his employment.

The North Carolina Workers' Compensation Act (the "Act") defines compensable injury as "only injury by accident arising out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6) (2015). The terms "arising out of" and "in the course of" employment "are not synonymous, but involve two distinct ideas and impose a double condition, both of which must be satisfied in order to render an injury compensable." *Williams v. Hydro Print, Inc.*, 65 N.C. App. 1, 5, 308 S.E.2d 478, 481 (1983) (citation omitted). As both requirements are "parts of a single test of work-connection . . . , 'deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other.' " *Id.* at 9, 308 S.E.2d at 483 (quotation marks and citation omitted). "The term 'arising out of' refers to the origin or cause of the accident, and the term 'in the course of' refers to the time, place, and circumstances of the accident." *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982) (citation omitted).

In *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938), the Supreme Court of North Carolina denied a workers' compensation claim by the estate of an employee who died while riding on a crate conveyor belt, despite a previous warning by his supervisor that riding the belt was dangerous and prohibited. The Commission relied on the Act's definition of compensable injury and concluded that the employee's death did not arise out of his employment because "there was no causal connection between the conditions under which the work was required to be performed and the resulting injury." *Id.* at 548, 196 S.E. at 876. The Supreme Court also quoted the Commission's reasoning that the employee died, not as a result of a risk inherent in his work activities, but rather

> by stepping aside from the sphere of his employment and voluntarily and in violation of his employer's orders, for his own convenience or for the thrill of attempting a hazardous feat, attempted to ride on machinery installed and used for another purpose and obviously dangerous for

> the use he attempted to make of it rather than take the usual course of going from the basement to the first floor by way of the stairs provided and used for that purpose.

Id. at 548, 196 S.E. at 876.

In *Spratt v. Duke Power Co.*, 65 N.C. App. 457, 465, 310 S.E.2d 38, 43 (1983), this Court allowed compensation pursuant to the Act for an employee who was injured while breaking a safety rule. The employee, who worked in an industrial plant, was running toward the canteen to buy chewing gum when he slipped on coal dust and fell. *Id.* at 459, 310 S.E.2d at 40. He knew that running inside the plant was prohibited and had been warned previously not to do so. *Id.* at 459, 310 S.E.2d at 40. This Court held "[t]he fact that the employee is not engaged in the actual performance of the duties of the job does not preclude an accident from being one within the course of employment." *Id.* at 468, 310 S.E.2d at 45 (citing *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E.2d 320 (1944)) (holding an employee's injury, which occurred when he was returning to the bathroom to retrieve his flashlight, arose in the course of employment).

In *Rivera v. Trapp*, 135 N.C. App. 296, 299, 519 S.E.2d 777, 779 (1999), this Court affirmed an award of compensation to an employee who was injured while operating a forklift, even though the employee's job duties did not include using the forklift. The Court distinguished *Teague*:

> *Teague* dealt with a situation where a thrill-seeking employee took action that bore no resemblance to accomplishing his job. Here, the record shows that plaintiff acted solely to accomplish his job. Plaintiff rode on the forklift to move necessary materials to the third floor. While this action may have been outside the "narrow confines of his job description" as a roofer, it is clear that plaintiff's actions were reasonably related to the accomplishment of the task for which he was hired. Further, in *Teague*, the foreman had given the plaintiff an express order not to ride the conveyor belt. Here, plaintiff testified that Schuck authorized him to ride the forklift.

Id. at 301-02, 519 S.E.2d at 780 (internal citations omitted); *see also Hensley v. Carswell Action Com. Inc.*, 296 N.C. 527, 531-32, 251 S.E.2d 399, 401-02 (1979) (holding that a groundskeeper who drowned after wading in a lake to cut weeds, ignoring a specific instruction not to go in the water, was injured in the course of and arising from his employment).

Arp v. Parkdale Mills Inc., 150 N.C. App. 266, 274, 563 S.E.2d 62, 68 (2002) (Tyson, J., dissenting), *adopted per curiam*, 356 N.C. 657, 576 S.E.2d 326 (2003), provides an analytical framework for assessing whether an employee's injury was causally related to the employment. In *Arp*, the North Carolina Supreme Court adopted the dissent of Judge Tyson ("*Arp*" or "the opinion"), which denied compensation to an employee who was injured when he fell from a seven and one-half foot fence on his employer's premises. *Id.* at 268, 563 S.E.2d at 64. The employee, who was leaving fifteen minutes before the end of his shift, had climbed the fence instead of exiting through a gate, which remained locked until the shift ended. *Id.* at 268, 563 S.E.2d at 64. *Arp* held that work-related activities are generally divided into two types:

> (1) actual performance of the direct duties of the job activities, and (2) incidental activities. The former are almost always within the course of employment, regardless of the method chosen to perform them. Incidental activities are afforded much less protection. If they are: (1) too remote from customary usage and reasonable practice or (2) are extraordinary deviations, neither are incidents of employment and are not compensable.

Id. at 277, 563 S.E.2d at 69-70 (internal citations omitted). *Arp* held that the plaintiff's activity—leaving work before his shift ended—was not in the actual performance of a direct job duty, and then assessed whether the plaintiff's actions constituted a reasonable incidental activity. *Id.* at 277, 563 S.E.2d at 69-70. The opinion noted that *Teague* and other North Carolina appellate decisions "have consistently denied compensation where the incidental activity was unreasonable." *Id.* at 278, 563 S.E.2d at 70. Distinguishing its analysis from negligence theory, the opinion concluded that the "[p]laintiff's unreasonable actions, *not* the grossly negligent manner in which he performed them, produced his injuries." Id. at 280, 563 S.E.2d at 71. In adopting this Court's opinion in *Arp*, the Supreme Court did not overturn *Spratt*, *Rivera*, or other decisions distinguishing *Teague*.

Considering our precedent, we now explain why the Commission's Opinion and Award in this case must be set aside and remanded.

The Commission's Conclusion of Law #3, challenged by Mr. Weaver, reads:

> The Full Commission's finding that Plaintiff was "joy-riding" or "thrill seeking," which bore no relation to accomplishing the duty for which Plaintiff was hired,

> removed Plaintiff from the scope of his employment. To the extent Plaintiff may have initially performed some work-related tasks with the forklift, his decision to do donuts on the Seegars' forklift, was too remote from customary usage and reasonable practice and constituted an extraordinary deviation from his employment. Pursuant to *Arp v. Parkdale Mills, Inc.*, 356 N.C. 657, 576 S.E.2d 326 (2003), the Full Commission concludes that Plaintiff's activity leading to his injury on 17 October 2012 was unreasonable. Consequently, Plaintiff's injury did not arise out of and in the course of his employment and is not compensable. N.C. Gen. Stat. § 97-2(6).

The Commission's determination that Mr. Weaver's "joyriding" or "thrill seeking" bore no relation to his job duties, despite being denominated as a conclusion of law, is actually a finding of fact. So is the Commission's determination that "Plaintiff may have initially performed some work related tasks with the forklift," contained in this same denominated conclusion of law. " 'Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.' " *Barnette*, ___ N.C. App. at ___, 785 S.E.2d at 165 (quoting *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)). These inconsistent factual findings—one stating that Mr. Weaver's actions bore no relation to his job duties, and the other stating that Mr. Weaver may have initially performed some work-related tasks with the forklift—preclude this Court from determining whether the Commission's findings support the legal conclusion that Plaintiff's operation of the forklift removed him from the scope of employment. Because these inconsistences are factual, too material to be disregarded as surplusage, and cannot be resolved by reference to other findings in the Opinion and Award, we must vacate the decision and remand for redetermination by the Commission. To guide the Commission in its proceedings on remand, we will address further the legal issues disputed between the parties and the applicable law.

[2] The Commission's finding that Mr. Weaver "may have initially performed some work-related tasks with the forklift" undermines the Commission's conclusion that the injury did not arise out of and in the course of the employment. Mr. Weaver testified that the accident occurred as he was returning the forklift to the warehouse after using it for work purposes. The Commission noted this testimony in its findings of fact but did not indicate whether it found the testimony credible.

"[A]n injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment." *Robbins v. Nicholson*, 281 N.C. 234, 239, 188 S.E.2d 350, 354 (1972) (internal quotation marks omitted). The analysis in *Robbins*, which pre-dated the Act, has been followed by this Court in applying the Act's definition of "injury." *See McGrady v. Olsten Corp.*, 159 N.C. App. 643, 647-48, 583 S.E.2d 371, 373 (2003) (holding a certified nursing assistant whose duties included preparing meals was injured in the course of and arising from her employment when she fell while climbing a tree in her employer's back yard to pick a pear).

The only statutory exceptions to guaranteed compensation for injuries from a work-related accident are (1) intoxication; (2) impairment from a controlled substance; and (3) willful intent to injure or kill oneself or another. N.C. Gen. Stat. § 97-12 (2015). Even an employee's willful violation of a safety rule does not preclude recovery, but instead reduces the recovery by ten percent. *Id.* We are aware of no prior North Carolina appellate decision addressing a claim by an employee who was engaged in thrill seeking while returning equipment used for work-related tasks. But the Commission did not clearly find that Mr. Weaver's accident occurred while he was returning the forklift after using it for a work-related task, and this Court cannot make factual findings.

The Commission's finding that Mr. Weaver "may have initially performed some work-related tasks with the forklift" materially alters the findings of fact contained in the Opinion and Award, and we cannot disregard the finding as surplusage. The Commission's use of the word "may" and its omission of any finding that Mr. Weaver's testimony was credible, so that the circumstances he testified about are not necessarily found as a fact, leave this Court only to guess what the Commission would have found if it had correctly applied *Arp*, *Spratt*, and other precedent.

[3] For the benefit of the Commission on remand, we also note that the Commission misapplied the law in a second finding in the same sentence. The finding —immediately following the finding that Mr. Weaver may have used the forklift for work-related tasks—that "his decision to do donuts . . . was too remote from customary usage and reasonable practice and constituted an extraordinary deviation from his employment" reflects a legal analysis applicable only to an incidental activity not related to the employment. The sentence as a whole, and considered in the context of the entire decision, indicates that the Commission misapprehended the law.

III. *Negligence Theory*

[4] The second issue before us is whether the Commission erroneously applied a negligence analysis to deny compensation to Mr. Weaver. Defendants contend the Commission did not apply a fault analysis, but rather determined that the nature of Mr. Weaver's actions was so far removed from his job duties that the accident was not causally related to the employment.

The Act "was created to ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003) (citation omitted).

Here, the Commission found the following facts:

> 35. Based upon a preponderance of the credible evidence of record, the Full Commission finds that Plaintiff was operating the forklift at such a speed to cause it to rollover and inflict the resulting serious injuries from which Plaintiff now suffers.
>
> 36. The Full Commission further finds that the manner in which Plaintiff operated the forklift preceding his injury was unreasonable and reckless, in essence joy riding and/or thrill seeking.

Unlike *Teague* and other decisions denying compensation for injuries caused by "dangerous thrill-seeking completely unrelated to the employment[,]" *Hensley*, 296 N.C. at 531, 251 S.E.2d at 401, here the Commission's conclusion is grounded in findings that characterize the *speed* and *manner* in which Plaintiff operated the forklift. These findings do not address whether Mr. Weaver was operating the forklift in furtherance of—or incidental to—his job duties and his employer's interest. These findings appear to impute negligence on behalf of the employee, indicating that the Commission reached its decision under a misapprehension of law.

> [T]he Workers' Compensation Act was 'intended to eliminate the fault of the workman as a basis for denying recovery' and that 'the only ground set out in the statute upon which compensation may be denied on account of the fault of the employee is when the injury is occasioned by his intoxication or willful intention to injure himself or another.' Thus, except as expressly provided in the statute

> (as in section 97–12, which is not involved here), fault has no place in the workers' compensation system.

Hassell v. Onslow Cty. Bd. of Educ., 362 N.C. 299, 304, 661 S.E.2d 709, 713 (2008) (internal citations and brackets omitted).

Because the Commission apparently misapplied the law and made contradictory findings of fact that preclude a resolution as a matter of law, we remand the matter to the Commission for redetermination based on the correct legal standards.

This is hardly the first decision by an appellate court in North Carolina remanding a case to the Full Commission to redetermine issues of fact and law because the Commission's opinion and award reflected an incorrect legal standard. "If the findings of the Commission are insufficient to determine the rights of the parties, the appellate court may remand to the Industrial Commission for additional findings." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000) (citation omitted). " 'The evidence tending to support [the] plaintiff's claim is to be viewed in the light most favorable to [the] plaintiff, and [the] plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.' " *Id.* at 106, 530 S.E.2d at 60 (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)).

In *Ballenger*, 320 N.C. at 157-58, 357 S.E.2d at 685, our Supreme Court modified a decision of this Court affirming a decision of the Commission in part but remanding the case to the Commission because the Commission employed an incorrect standard for resolving conflicting medical testimony. This Court mandated a remand "for a determination whether, uninfluenced by the . . . misstatement, the Commission actually and dispassionately weighed the evidence before it concluded there was sufficient evidence to support a finding in plaintiff's favor." *Id.* at 157-58, 357 S.E.2d at 685 (internal quotation marks omitted) (alterations in original). The Supreme Court held that this Court erred "in not remanding to the Commission for new findings of fact and conclusions of law applying the correct legal standard." *Id.* at 158, 357 S.E.2d at 685. Like the Supreme Court in *Ballenger*, this Court expresses no opinion as to the merits of Mr. Weaver's case. "We hold only that the [F]ull Commission must make a complete redetermination," *id.* at 158, 357 S.E.2d at 685, based upon the correct legal standard.

A series of decisions by this Court in a case outside the context of workers' compensation is instructive. In *In re A.B.*, 239 N.C. App. 157, 172, 768 S.E.2d 573, 581-82 (2015) ("*A.B. I*"), this Court reversed an order terminating parental rights because "[t]he contradictory nature of the

trial court's findings of fact and conclusions of law prohibit this Court from adequately determining if they support the court's conclusions of law . . ." and remanding to the trial court "for entry of a new order clarifying its findings of fact and conclusions of law." Following remand, the trial court entered a revised order terminating the respondent's parental rights. This Court affirmed that order on appeal. *See In re A.B.*, __ N.C. App. __, __, 781 S.E.2d 685, 692 (2016), *review denied sub nom.*, __ N.C. __,793 S.E.2d 695 (2016) ("*A.B. II*"). In *A.B. II*, the respondent contended that the trial court exceeded this Court's remand for a revised order "clarifying" its findings of fact because the trial court made new findings. *Id.* at __, 781 S.E.2d at 692. This Court held that when read in context of the entire decision, the word "clarifying" indicates "that this Court remanded this case for the trial court to make whatever changes necessary to have an internally consistent order." *Id.* at __, 781 S.E.2d at 692.

To make sure our mandate is clear, we remand this matter to the Commission to weigh the evidence and redetermine the factual and legal issues necessary to resolve Mr. Weaver's claim. It is not necessary that the Commission receive any additional evidence, although in its discretion it may do so. The Commission is not precluded from restating findings and conclusions from the Opinion and Award we have set aside, if those findings and conclusions are consistent with this opinion, based on competent evidence, and reflect that the Commission has applied the correct legal standards.

Conclusion

For all of the reasons stated above, we set aside the Commission's Opinion and Award and remand this matter for further proceedings consistent with this opinion.

VACATED and REMANDED.

Judge BRYANT concurs. Judge TYSON dissents with separate opinion.

TYSON, Judge, dissenting.

The Commission's Opinion and Award concluded Plaintiff's "decision to do donuts on the Seegars' forklift, was too remote from customary usage and reasonable practice and constituted an extraordinary deviation from his employment." Competent evidence in the record supports the Commission's findings. These findings of facts are binding

upon appeal and support the Commission's conclusions of law. This Court is bound by the standard of appellate review on the Commission's Opinion and Award. The decision of the Commission should be affirmed. I respectfully dissent.

I. Standard of Review

This Court reviews an opinion and award of the Commission to determine "whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001).

"[T]he Commission is the fact finding body. . . . [and is] the sole judge of the credibility of the witnesses and the weight to be given to their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (internal citations and quotation marks omitted). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 304-05, 663 S.E.2d 322, 325 (2008).

The Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

II. Plaintiff's Unreasonable Activity

Plaintiff argues the Commission erred by finding his actions removed him from the course and scope of his employment and that his injury did not arise out of his employment. After reviewing the Commission's *binding and unchallenged* findings of fact, his contention is without merit.

A. Arise Out Of and In The Course Of Employment

"In order to be compensable under our Workers' Compensation Act, an injury must arise out of and in the course of employment." *Barham v. Food World, Inc.*, 300 N.C. 329, 332, 266 S.E.2d 676, 678 (1980). Our courts have stated that " 'course of employment' and 'arising out of employment' are both parts of a single test of work-connection and therefore, 'deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other.' " *Williams v. Hydro Print, Inc.*, 65 N.C. App. 1, 9, 308 S.E.2d 478, 483 (1983) (quoting *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976)). "Together, the two phrases are used in an attempt to separate work-related injuries from nonwork-related injuries." *Id.* at 5, 308 S.E.2d at 481.

"In general, the term 'in the course of' refers to the time, place and circumstances under which an accident occurs, while the term 'arising out of' refers to the origin or causal connection of the accidental injury to the employment." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977) (citations omitted); *see Williams*, 65 N.C. App. at 7, 308 S.E.2d at 482 ("An injury arises out of employment when it comes from the work the employee is to do, or out of the service he is to perform, or as a natural result of one of the risks of the employment[.]" (citation and internal quotation marks omitted)).

" 'There must be some causal relation between the employment and the injury.' " *Bass v. Mecklenburg County*, 258 N.C. 226, 231, 128 S.E.2d 570, 574 (1962) (quoting *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 153 S.E. 266 (1930)). Where no causal connection exists, the injury is not compensable. *Arp v. Parkdale Mills, Inc.*, 150 N.C. App. 266, 274, 563 S.E.2d 62, 68 (2002) (Tyson, J., dissenting), *adopted per curiam*, 356 N.C. 657, 576 S.E.2d 326 (2003). "The burden of proving the causal relationship or connection rests with the claimant." *Id.* (citing *McGill v. Town of Lumberton*, 218 N.C. 586, 587, 11 S.E.2d 873, 874 (1940)).

Our Supreme Court has held:

> [W]hether plaintiff's claim is compensable turns upon whether the employee acts for the benefit of his employer to any appreciable extent or whether the employee acts solely for his own benefit or purpose or that of a third person.
>
> *. . . we find that thrill seeking which bears no conceivable relation to accomplishing the job for which the employee was hired moves the employee from the scope of his employment.*

Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 258-59, 293 S.E.2d 196, 202 (1982) (emphasis supplied) (citations and quotation marks omitted).

B. Employment Related Activities

Employment related activities are divided into two types:

> (1) actual performance of the direct duties of the job activities, and (2) incidental activities. The former are almost always within the course of employment, regardless of the method chosen to perform them. Incidental activities are afforded much less protection. If they are: (1) too remote from customary usage and reasonable practice or

> (2) are extraordinary deviations, neither are incidents of employment and are not compensable.

Arp, 150 N.C. App. at 277, 563 S.E.2d at 69-70 (internal citations omitted).

The Industrial Commission and North Carolina courts have consistently denied compensation where the incidental activity by the employee was unreasonable. *See id.* at 278, 563 S.E.2d at 70 (denying compensation where the employee left his shift early and was injured when he attempted to exit by climbing a barb wire gate, rather than exiting through an available gate); *see also Matthews v. Carolina Standard Corp.*, 232 N.C. 229, 234, 60 S.E.2d 93, 96 (1950) (holding plaintiff's injury and death "did not result from a hazard incident to his employment" when he attempted to jump onto a truck moving across employer's property after hearing the lunch whistle); *Moore v. Stone Co.*, 242 N.C. 647, 647-48, 89 S.E.2d 253, 254 (1955) (holding the employee's injuries did not arise out of employment when the employee for unknown reasons or for curiosity, while eating lunch, attempted to set off a single dynamite cap and accidentally detonated other dynamite caps); *Teague v. Atlantic Co.*, 213 N.C. 546, 548, 196 S.E. 875, 876 (1938) (denying compensation where the employee "stepp[ed] aside from the sphere of his employment and voluntarily . . . for his own convenience or for the thrill of attempting a hazardous feat, attempted to ride" a conveyor belt instead of taking the employer provided steps).

C. Analysis

The Commission made the following relevant findings of fact which the majority's opinion agrees are supported by competent evidence:

> 15. Several minutes after they arrived at the workyard, Mr. Mapes testified he heard "lots of loud noises nextdoor [sic] of equipment running at a high throttle." Mr. Mapes testified that "peeking over I did see a forklift, green and white, and the Bobcat as well." However, it was unusual to see the forklift in use at any time other than the mornings, according to Mr. Mapes. He further testified that he observed "[t]he forklift was being operated rather recklessly." In addition, Mr. Mapes testified that he did not see any work materials and that "there was no indication that there was any work being done." Rather, Mr. Mapes testified he observed the forklift being driven in circles or donuts.
>
> . . .

> 32. Andrew Webb, a professional accident reconstructionist, was hired by Defendant-Seegars to investigate the accident. . . . Mr. Webb stated the impressions were consistent with the testimony of Mr. Mapes in that the vehicle Plaintiff was operating was doing high-speed turns or donuts. Mr. Webb testified that the maneuvers Plaintiff performed on the forklift were consistent with the photographs showing the curved tire impressions which were consistent with donuts.
>
> . . .
>
> 34. The Full Commission finds, based upon a preponderance of the evidence, that Mr. Webb's accident reconstruction and resulting opinions are not speculative and that Mr. Webb's opinions are credible.
>
> 35. Based upon a preponderance of the credible evidence of record, the Full Commission finds that Plaintiff was operating the forklift at such a speed as to cause it to rollover and inflict the resulting serious injuries from which Plaintiff now suffers.
>
> 36. The Full Commission further finds that the manner in which Plaintiff operated the forklift preceding his injury was unreasonable and reckless, in essence joy riding and/or thrill seeking.

The Commission then concluded:

> 3. The Full Commission's finding that Plaintiff was "joyriding" or "thrill seeking," which bore no relation to accomplishing the duty for which Plaintiff was hired, removed Plaintiff from the scope of his employment. To the extent Plaintiff may have initially performed some work-related tasks with the forklift, his decision to do donuts on the Seegars' forklift, was too remote from customary usage and reasonable practice and constituted an extraordinary deviation from his employment. Pursuant to *Arp v. Parkdale Mills, Inc.*, 356 N.C. 657, 576 S.E.2d 326 (2003), the Full Commission concludes that Plaintiff's activity leading to his injury on 17 October 2012 was unreasonable. Consequently, Plaintiff's injury did not arise out of and in the course of his employment and is not compensable. N.C. Gen. Stat. § 97-2(6).

The majority's opinion states Conclusion of Law 3 contains inconsistent factual findings: "one stating that Mr. Weaver's actions bore no relation to his job duties, and the other stating that Mr. Weaver may have initially performed some work-related tasks with the forklift[.]" Because the Commission found Mr. Weaver "may" have been initially engaged in a work-related task, the majority's opinion asserts the Commission's findings fail to support the conclusion that Plaintiff's injuries did not arise out of and in the course of his employment. The majority's opinion further notes the Commission's Opinion and Award demonstrates a misapprehension of the law. I respectfully disagree.

Even if or "[t]o the extent" Conclusion of Law 3 contains some re-stated findings of fact, *see Barnette v. Lowe's Home Ctrs., Inc.*, __ N.C. App. __, __, 785 S.E.2d 161, 165 (2015), these findings are entirely consistent with and support the Commission's ultimate conclusion. The majority's opinion unduly parses the Commission's findings and conclusions. The majority fails to apply the plain and ordinary meanings of the Commission's words to wrongfully conclude they are inconsistent with one another in order to compel a different result. Such substitution of a result is inconsistent with this Court's standard of review. *See Adams*, 349 N.C. at 680-81, 509 S.E.2d at 413-14.

The Commission, as the sole judge of the credibility of the witnesses, merely acknowledged "[t]o the extent" Mr. Weaver may have initially or even arguably used the forklift to perform work-related activities, "his decision to do donuts on the Seegars' forklift, was too remote from customary usage and reasonable practice and constituted an extraordinary deviation from his employment" and constituted joyriding or thrill seeking. In every previous case denying compensation, the employee was at work and may have performed activities consistent with his employment prior to engaging in conduct or actions which "bore no relation to his job duties."

It appears that on remand, the majority is requiring the Commission to reweigh the evidence to again determine whether Mr. Weaver's testimony he was initially using the forklift for work-related activities is credible, because "the Commission did not clearly find that Mr. Weaver's accident occurred while he was returning the forklift after using it for a work-related task[.]" This notion ignores binding precedents.

Whether Mr. Weaver initially performed work-related activities is wholly inconsequential, as the employee carries the burden and a causal connection is still required to find that an employee's injuries arose out of and in the course of employment at the time of the injury. *See Arp*, 150 N.C. App. at 274, 563 S.E.2d at 68.

Here, after weighing all the competent evidence, the Commission specifically found Mr. Weaver was engaged in joyriding or thrill seeking. This finding is fully supported by the competent testimonies of Mr. Webb and Mr. Mapes, which the Commission found to be credible. The Commission then proceeded to conclude Mr. Weaver's joyriding or thrill seeking was an unreasonable activity, which bore no relation to his employment; constituted an extraordinary deviation from his employment; and even "[t]o the extent" Mr. Walker was " at work" or may have initially performed some work-related tasks, his joyriding or thrill seeking *ultimately broke the causal connection between his employment and his injuries*.

The Commission's conclusion is entirely consistent with our precedents. *See id.* at 277, 563 S.E.2d at 70 ("If [the activities] are: (1) too remote from customary usage and reasonable practice or (2) are extraordinary deviations, neither are incidents of employment and are not compensable."); *Hoyle*, 306 N.C. at 259, 293 S.E.2d at 202 ("[T]hrill seeking which bears no conceivable relation to accomplishing the job for which the employee was hired moves the employee from the scope of his employment.").

Competent and credible evidence in the record demonstrates Mr. Weaver clearly engaged in joyriding or thrill seeking. Though this thrill seeking activity unfortunately resulted in serious injuries, competent evidence supports and the Commission correctly concluded Mr. Weaver's actions clearly removed him from any prior or asserted activity within the "scope of his employment" such that his injuries did not arise out of and in the course of his employment. *See Hoyle*, 306 N.C. at 259, 293 S.E.2d at 202. The Commission's Opinion and Award denying Plaintiff compensation is entirely consistent with long standing Supreme Court of North Carolina precedents, is supported by competent evidence, and is properly affirmed. *See id.*

III. Negligence Analysis

Plaintiff further argues the Commission erroneously applied a negligence standard to hold Plaintiff's injuries are not compensable. I disagree.

North Carolina precedents clearly hold negligence, and even gross negligence, do not bar Plaintiff from recovery. *See*, *e.g.*, *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003). However, binding precedents also distinguish a claimant's unreasonable actions from negligence or gross negligence. *Arp*, 150 N.C. App. at 280,

563 S.E.2d at 71. Where the Commission's decision is based on the claimant's "unreasonable actions, *not* the grossly negligent manner in which he performed them," Plaintiff has failed to carry his burden and compensation is properly denied. *See id.* (emphasis original).

Here, nothing in the record or in the Commission's findings of fact or conclusions of law indicate it relied upon any negligence theory to deny compensation. Furthermore, the Commission found Mr. Weaver's decision to engage in joyriding or thrill seeking was an *unreasonable activity*. As such, his argument is without merit. *See id.*

IV. Conclusion

Plaintiff failed to carry his burden to prove his injuries are compensable. The Commission's findings of fact are supported by competent evidence, which support its conclusions of law. *See Oliver*, 143 N.C. App. at 170, 544 S.E.2d at 608 (2001). The record and Opinion and Award demonstrate the Commission correctly understood and applied the law and did not erroneously apply a negligence standard to this case.

While this Court may remand a case to the Industrial Commission under certain circumstances, in this case remand is error, entirely unnecessary, and does not promote judicial economy. *See, e.g.*, *Lanning v. Fieldcrest-Cannon, Inc.* 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000).

Based upon long standing and binding precedents and our standard of review, the Commission's Opinion and Award denying Plaintiff compensation should be affirmed. I respectfully dissent.

WILSON v. PERSHING, LLC

[253 N.C. App. 643 (2017)]

RICHARD C. WILSON, PLAINTIFF
v.
PERSHING, LLC; BANK OF NEW YORK MELLON CORPORATION; JBS LIBERTY SECURITIES, INC.; THE PNC FINANCIAL SERVICES GROUP, INC.; SYNERGY INVESTMENT GROUP, LLC; JBS GROUP, LLC; RBC CAPITAL MARKETS CORPORATION; AND JOHN DOE 1, DEFENDANTS

No. COA16-803

Filed 16 May 2017

1. Appeal and Error—appellate rules violation—Rule 28(b)(6)—no sanctions

The Court of Appeals elected not to impose any sanctions for plaintiff's failure to follow N.C. R. App. 28(b)(6), requiring a brief to contain a concise statement of the applicable standard of review.

2. Appeal and Error—preservation of issues—failure to object at trial

Plaintiff abandoned the issue that his motion to continue a hearing on defendants' motion to dismiss all charges should have been granted based on plaintiff's filing of an amended complaint. Plaintiff failed to object at trial.

3. Appeal and Error—preservation of issues—standing—abandonment of argument

Plaintiff abandoned the issue of standing based on his failure to argue it in his brief. The trial court's dismissal of all claims against certain defendants under Rule 12(b)(1) remained undisturbed.

4. Statutes of Limitation and Repose—breach of fiduciary duty—fraud—constructive fraud—outdated uncashed check in storage—due diligence

In a case involving the discovery of an outdated uncashed check found in storage files, the trial court did not err by concluding that plaintiff real estate company owner's claims for breach of fiduciary duty, fraud, and constructive fraud against defendants Synergy and JBS Liberty were barred by the applicable statute of limitations. Plaintiff's failure to use due diligence in discovering the alleged fraud was established as a matter of law.

Appeal by plaintiff from order entered 17 December 2015 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 7 March 2017.

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for plaintiff-appellant.

McGuireWoods, LLP, Charlotte, by Brian P. Troutman, Wm. Grayson Lambert, and Anita Foss, for defendants-appellees Pershing, LLC and Bank of New York Mellon Corporation.

Jones Law Firm, by Jeffrey D. Jones, for defendants-appellees JBS Liberty Securities, Inc. and Synergy Investment Group, LLC.

Poyner Spruill LLP, Charlotte, by Thomas L. Ogburn III and John M. Durnovich, for defendant-appellee The PNC Financial Services Group, Inc.

Womble Carlyle Sandridge & Rice, LLP, by W. Clark Goodman, for defendant-appellee RBC Capital Markets Corporation.

ZACHARY, Judge.

Plaintiff Richard C. Wilson appeals from an order dismissing his civil claims against Pershing, LLC (Pershing), Bank of New York Mellon (BNY Mellon), JBS Liberty Securities, Inc. (JBS Liberty), Synergy Investment Group, LLC (Synergy), JBS Group, LLC (JBS Group), RBC Capital Markets Corporation (RBCCMC), and John Doe I (collectively, defendants) pursuant to Rules 12(b)(1), (4), and (6) of the North Carolina Rules of Civil Procedure. For the reasons that follow, we affirm the trial court's order in its entirety.

I. Background

Wilson is the founder of Ipswich Bay, LLC (Ipswich), a real estate development company. In 1996, Wilson sought to purchase and develop 112 acres of real property located on Lake Norman. This development project was entitled "Harbor Cove." After Wilson obtained a revolving line of credit from Centura Bank (the Centura Loan) to finance the Harbor Cove project, he engaged a tax attorney to provide tax treatment and planning advice related to the Centura Loan. Working with Centura, Wilson's legal team determined that Wilson could obtain certain tax advantages if funds to be used as security for the Centura Loan were held in a trust account.

According to Wilson, on 28 February 1996, Centura Bank Vice President Greg Grier stated that $250,000.00 could be deposited into

a trust account at Centura Bank, and that the funds would serve as collateral for the Centura Loan as well as other potential loans. These funds were subsequently invested in mutual fund investment accounts (the Ipswich Security Account) that were managed by either Centura Bank or Centura Securities, Inc. (Centura Securities). As part of Wilson's tax strategy, the funds in the Ipswich Security Account were held for his benefit, but not in his name. It appears that Chris Teague, a Centura employee, was responsible for managing the Ipswich Security Account. Wilson understood that the $250,000.00 deposit would remain invested in mutual funds until he requested that the money be returned to him, that he would benefit from mutual fund appreciation, and that no taxes would be levied on funds in the Ipswich Security Account or on any gains accruing while those monies were held in trust.

It is not clear how long the Harbor Cove project lasted, but Wilson alleges that he "continued to sell property in Harbor Cove through and after 2006." Wilson also alleges that while he met with his accountant, attorneys, and bankers concerning the Harbor Cove project "on a quarterly basis for many years[,]" none of Wilson's "trusted advisors" ever indicated that the funds from the Ipswich Security Account needed to be transferred or liquidated. In 2013, Wilson met with his accountant to discuss potential tax write-offs related to Ipswich's developments at Lake Norman. While gathering information concerning Ipswich's depreciation schedules reaching back to 1985, Wilson "discovered Ipswich's detailed documentary records that had been kept in storage for [him]." Wilson found within the Ipswich files a certified check issued by Centura Securities in the amount of $250,000.00. The check, dated 23 October 1998, was made payable to "Richard Gregg Wilson"[1] and stated on its face that it was "void after 180 days." In addition, the check displayed references to defendant BNY Mellon and defendant Pershing, a wholly owned subsidiary of BNY Mellon. Wilson later learned that Pershing was a service provider on the Ipswich Security Account.

Wilson contacted PNC Bank, N.A. (PNC)—an entity that Wilson believed was the successor in interest to Centura Securities—in late 2013 regarding the check, and PNC indicated that it would research the matter. While his inquiry was pending with PNC, Wilson presented the check to Wells Fargo, N.A., which refused to honor it and referred Wilson to the check's maker. By letter dated 15 January 2014, PNC informed Wilson

1. On appeal, Wilson maintains that his name is "Richard Craig Wilson." However, a copy of Wilson's drivers' license contained in the record appears to list Wilson's middle name as "Gregg" or "Cregg."

that "[a]lthough the assets in the account with Centura Securities, Inc. [(i.e., the Ipswich Securities Account)] secured a loan made by Centura Bank, Centura Bank never had possession of the funds or the account other than its security interest." The letter further stated that PNC never acquired any portion of Centura Securities; rather, Centura Securities became RBC Centura Securities, an entity that sold some of its assets to RBC Dain Rausher, which was later acquired by defendants Synergy and JBS Group in 2007. After Wilson filed a complaint with the U.S. Consumer Financial Protection Bureau, PNC reiterated that it never acquired any part of Centura Securities, and that Wilson's claim had to be directed to Synergy or JBS.

Wilson eventually retained legal counsel, who presented the check to and demanded payment from BNY Mellon in August 2014. Pershing's general counsel, Jane Myers, responded to this demand by letter dated 10 September 2014. Myers explained that Pershing acted as a "clearing" firm for the investment account managed by Centura Securities. In this capacity, Pershing was limited to providing "custodial, execution[,] and clearance services" for the Ipswich Security Account. Myers also rejected Wilson's demand for payment on the check as follows:

> [T]he check here was not a "certified casher's" check as you claim, but was drawn against the assets held in the Account. On its face, the check stated that is was "void after 180 days" when it was issued 15 years ago. . . .
>
> Because the age of the check exceeds the record retention period, [Pershing has] very limited information about the check and the Account. However, [Pershing's] records reflect that the check was stopped on or about October 26, 1998. The Account was subsequently closed in July 1999.[2] Accordingly, there are no funds on deposit with Pershing and/or BNY Mellon purportedly owed to [Wilson] on the check. [Pershing] must direct you to the drawer of the check for any amounts allegedly owed.

Unable to negotiate the check or otherwise locate the Ipswich Security Account funds, Wilson filed a verified complaint (original

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2. Before Wilson's demand for payment on the check was refused, Wilson's attorney had spoken with David Butler, an attorney in Pershing's legal department. Wilson alleges that Butler "refused to tell [Wilson's counsel] who directed that the Ipswich Security Account be closed[,]" and that "Butler represented he was not able to discern or disclose to whom the money in the Ipswich Security Account was distributed."

complaint) in Catawba County Superior Court against Pershing, BNY Mellon, Synergy, JBS Liberty, JBS Group, RBCCMC, and John Doe I. The original complaint, filed 22 May 2015, alleged claims for breach of fiduciary duty, constructive fraud, unjust enrichment, breach of contract, fraud, and unfair and deceptive trade practices. Defendants all filed motions to dismiss Wilson's original complaint. On 2 November 2015, the Honorable Timothy Kincaid conducted a hearing on defendants' motions to dismiss.

Shortly before Judge Kincaid called the case for hearing, Wilson's attorney filed an amended complaint and served it on defendants' attorneys. The amended complaint contained some new allegations and added a claim for civil conspiracy,[3] but it generally mirrored the original complaint. Once the case came on for hearing, Wilson's attorney argued that the filing of the amended complaint rendered moot defendants' motions to dismiss, which were directed at the original complaint. Wilson's attorney then asserted that the trial court should not proceed with the hearing, and that the parties should be granted time to brief issues raised by the amended complaint. Defense counsel, however, advised the court that they were prepared to proceed as scheduled. Judge Kincaid refused to continue the hearing, reserved his ruling on Wilson's motion to amend, and proclaimed as follows:

> [I]f I'm able to determine that [Wilson's] amended complaint can be filed as a matter of right, and would make any ruling that I make moot, then that's what I'll do. But I can't make a ruling on whether or not to hear the thing until I hear the thing. So . . . that's what I'm going to do.

As the hearing went forward, both parties referenced the original complaint and the amended complaint in their arguments to the court. Toward the end of the hearing, Judge Kincaid announced that he would dismiss all claims against defendants, and explained that his ruling applied to the original complaint. Defendants then sought clarification as to whether Judge Kincaid's ruling extended to the amended complaint. Acknowledging that he "had not determined whether or not it ha[d] been filed as a matter of right[,]" Judge Kincaid stated that because it was "clear argument was referenced to the amended complaint[,] I'm going to consider that as a waiver of any objection [by defendants] to amend, allow the amendment, and then grant the motions [to dismiss] that I

3. More specifically, the new claim alleged that "[o]ne or more of the [d]efendants conspired" to commit a breach of fiduciary duty, constructive fraud, and fraud.

just granted on the original the same as to the amended." Judge Kincaid also concluded that Wilson had waived any objection to the trial court's decision to proceed with the hearing and to rule on the defendants' oral motions to dismiss the amended complaint.

On 17 December 2015, Judge Kincaid entered a written order that memorialized his oral rulings at the 2 November 2015 hearing. Judge Kincaid concluded that all of Wilson's claims should be dismissed pursuant to Rule 12(b)(6) because they were time-barred by the applicable statutes of limitations. The written order also contained additional reasons as to why Wilson's claims against individual defendants were dismissed.

The claims against Pershing, BNY Mellon, PNC, and RBCCMC were dismissed by the court pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of standing. Judge Kincaid further ruled that dismissal was proper under Rule 12(b)(6) because Wilson failed to allege the existence of a contractual and a fiduciary relationship between either BNY Mellon or RBCCMC[4] and Wilson, and that Wilson failed to plead any alleged fraudulent acts by BNY Mellon and RBCCMC with particularity, as required by Rule 9(b) of the North Carolina Rules of Civil Procedure. The fraud claims against Synergy and JBS Liberty were also dismissed because they failed to satisfy Rule 9(b)'s particularity requirements. Wilson appeals from the order dismissing his claims against defendants.

II. Discussion

A. Trial Court's Refusal to Continue the 2 November 2015 Hearing

We first address Wilson's assertion that Judge Kincaid improperly proceeded with the hearing on defendants' motions to dismiss. A trial court's ruling on a motion to continue is reviewed for abused of discretion. *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873 (2001) (citation omitted). "[T]here is power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Watters v. Parrish*, 252 N.C. 787, 791, 115 S.E.2d 1, 4 (1960).

[1] Initially we note that defense counsel has brought to the Court's attention the fact that Wilson's brief violates Rule 28(b)(6) of the Rules of Appellate Procedure because it does not contain a concise statement

4. The claims against RBCCMC were also dismissed pursuant to Rule 12(b)(4) of the North Carolina Rules of Civil Procedure for insufficient service of process.

of the applicable standard of review for this issue. The Appellate Rules are mandatory, and failure to comply with them subjects an appeal or issue to dismissal. *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007). However, our Supreme Court has held that failure to comply with a nonjurisdictional rule, such as Rule 28(b)(6), "normally should not lead to dismissal[,]" *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008), though some other sanction pursuant to Rules 25(b) or 34 may be appropriate. *Hart*, 361 N.C. at 311, 644 S.E.2d at 202. In this instance, we elect not to take any action.

[2] Wilson argues that his motion to continue the hearing should have been granted because the filing of his amended complaint—which occurred minutes before the hearing—rendered defendants' motions to dismiss the original complaint moot. However, Wilson's argument ignores defendants' oral motions to dismiss the amended complaint, and Wilson does not challenge on appeal the trial court's consideration of those motions.

It is true that defendants' motions to dismiss the original complaint eventually became moot. However, this did not occur until the trial court *allowed* Wilson to amend the original complaint at the end of the hearing. *See Houston v. Tillman*, 234 N.C. App. 691, 695, 760 S.E.2d 18, 20 (2014) (holding that the "plaintiff's amendment and restatement of the complaint[,]" which was accepted by the trial court, "rendered any argument [by the defendants] regarding [their motions to dismiss] the original complaint moot"). As the hearing unfolded, defendants and Wilson referenced the amended complaint while making their arguments. Although Judge Kincaid initially granted the defendants' motions to dismiss the original complaint, shortly thereafter, he granted Wilson's motion to amend, concluding that defendants had waived any objection to the amendment. Judge Kincaid then dismissed the amended complaint upon the same grounds that warranted dismissal of the original complaint.

The gravamen of Wilson's contention is that he was prejudiced by Judge Kincaid's decisions to hear arguments on the original complaint, dismiss the original complaint in its entirety, and then extend that ruling to the amended complaint. However, we need not decide this issue. Although Wilson's counsel argued that the court should not proceed with the hearing, Judge Kincaid's conclusion that Wilson waived "any objection to the [trial court's] consideration of the Motion to Dismiss with respect to the Amended Complaint" has not been challenged on

appeal. Consequently, we deem this issue abandoned pursuant to Rule 28(b)(6) of the Rules of Appellate Procedure.

B. Scope of Appeal

[3] Because the "Issues Presented" section of Wilson's principal brief purports to raise thirteen issues on appeal, we must first determine whether all of those issues are properly before us. One point of considerable dispute is whether Wilson has preserved for appellate review the trial court's dismissal of his claims against Pershing, BNY Mellon, PNC, and RBCCMC for lack of standing.

Standing, which is properly challenged by a Rule 12(b)(1) motion to dismiss, *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001), "is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial Courier Express Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005).

Wilson argues in his reply brief that the "Issues Presented, Statement of the Case, relevant parts of the Statement of Facts, and Argument Section F [(Wilson's challenge to the trial court's decision to proceed with the 2 November 2015 hearing)] clearly challenge (and defeat) [the] erroneous assertion that [the standing] arguments were abandoned." Wilson's position is inherently flawed for the following reasons. To begin, the issues presented, statement of the case, and statement of the facts sections of an appellant's brief cannot substitute for substantive *arguments* on an issue. *See* N.C. R. App. P. 28(b)(6) (requiring that a principal brief "contain the *contentions* of the appellant with respect to each issue presented" and providing that "[i]ssues not presented in a party's brief, or in support of which *no reason or argument* is stated, will be taken as abandoned") (emphasis added). As Wilson's principal brief does not contain any substantive arguments on standing, this issue has been abandoned. *Id.* Wilson's reply brief cannot be used to correct this deficiency in his principal brief. *Larsen v. Black Diamond French Truffles, Inc.*, __ N.C. App. __, __, 772 S.E.2d 93, 96 (2015) (a party's reply brief could not correct the omission of a statement of the grounds for appellate review in the party's principal brief); *Beckles-Palomares v. Logan*, 202 N.C. App. 235, 246, 688 S.E.2d 758, 765 (2010) (the defendant's contention that the plaintiff's claim was barred by the applicable statute of repose was abandoned and the issue could not be revived via reply brief). In addition, no portion of Wilson's argument concerning the

2 November 2015 hearing challenges the trial court's dismissal on the basis of lack of standing. Because any argument on the standing issue has been abandoned, the trial court's dismissal of all of Wilson's claims against Pershing, BNY Mellon, PNC, and RBCCMC under Rule 12(b)(1) remains undisturbed.

As a result, the only issues remaining on appeal are those related to the trial court's dismissal of Wilson's claims against Synergy and JBS Liberty. Wilson does not assert that his claims for unjust enrichment, breach of contract, unfair and deceptive trade practices, and civil conspiracy against Synergy and JBS Liberty were improperly dismissed. Any argument that those claims were erroneously dismissed is abandoned, N.C. R. App. P. 28(b)(6), and the trial court's unchallenged dismissal of those claims remains undisturbed. A careful review of Wilson's principal brief, however, reveals that he does specifically challenge the trial court's Rule 12(b)(6) dismissal of his claims against Synergy and JBS Liberty for breach of fiduciary duty, constructive fraud, and fraud. Consequently, our review is limited to whether the trial court erred in dismissing any or all of these three claims, as alleged against Synergy and JBS Liberty.

C. Standard of Review under Rule 12(b)(6)

Rule 12(b)(6) provides for the dismissal of an action when the complaint "fail[s] to state a claim upon which relief can be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015). Our review of an order granting a Rule 12(b)(6) motion has several aspects. We consider "whether the allegations of the complaint . . . are sufficient to state a claim upon which relief can be granted under some legal theory." *Coley v. State*, 360 N.C. 493, 494-95, 631 S.E.2d 121, 123 (2006) (citation and internal quotation marks omitted). Under this mode of review, "the well-pleaded material allegations of the complaint are taken as true[,]" *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (citation omitted), and "the complaint is liberally construed[.]" *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014). Legal conclusions, however, are not entitled to a presumption of validity." *Id.* Similarly, this Court is "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (citations and internal quotation marks omitted). In sum, this Court "must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Craven v. Cope*, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008) (citation omitted).

D. Statutes of Limitations

[4] Judge Kincaid dismissed all of Wilson's claims on the basis that they were time-barred by the applicable statutes of limitations. As explained above, however, the dismissal of Wilson's claims for breach of fiduciary duty, fraud, and constructive fraud against Synergy and JBS Liberty are the only issues that remain subject to appellate review.

A Rule 12(b)(6) motion to dismiss is the proper vehicle for asserting " '[a] statute of limitations defense . . . if it appears on the face of the complaint that such a statute bars the claim. Once the defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff.' " *Birtha v. Stonemor, N. Carolina, LLC*, 220 N.C. App. 286, 292, 727 S.E.2d 1, 6-7 (2012) (quoting *Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996)).

Wilson makes a general argument that the relevant statutes of limitations did not begin to run until he discovered the uncashed check and unsuccessfully attempted to negotiate it. Wilson then makes the more specific argument that he has sufficiently "alleged his efforts supporting his diligence (including periodic meetings with his advisors), and that his trusted advisors' representations prevented Wilson from learning earlier in time that the Ipswich Security Account was closed." We disagree.

"Allegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1) ([2015])." *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). In contrast, "[a] claim of constructive fraud based upon a breach of a fiduciary duty falls under the ten-year statute of limitations contained in N.C. Gen. Stat. § 1-56 ([2015])." *NationsBank of N. Carolina, N.A. v. Parker*, 140 N.C. App. 106, 113, 535 S.E.2d 597, 602 (2000). Claims for actual fraud are subject to a three-year statute of limitations. N.C. Gen. Stat. § 1-52(9) (2015).

In general, "[s]tatutes of limitation are . . . seen as running from the time of injury, or discovery of the injury in cases where that is difficult to detect. They serve to limit the time within which an action may be commenced after the cause of action has accrued." *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985).

With respect to actual fraud claims, "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9) (2015). " '[D]iscovery' means either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence." *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547, 589 S.E.2d 391, 396 (2003). The circumstances at issue dictate whether this determination falls within the province of the jury or the trial court. Whether a plaintiff exercised due diligence in discovering the fraud is ordinarily an issue of fact for the jury "when the evidence is not conclusive or is conflicting." *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976). "Failure to exercise due diligence may be determined as a matter of law, however, where it is clear that there was both *capacity* and *opportunity* to discover the [fraud]." *Spears v. Moore*, 145 N.C. App. 706, 708-09, 551 S.E.2d 483, 485 (2001) (emphasis added) (citing *Huss*, 31 N.C. App. at 468, 230 S.E.2d at 163). Furthermore, "it is generally held that when it appears that by reason of the confidence reposed the confiding party is *actually deterred* from sooner suspecting or discovering the fraud, he is under no duty to make inquiry until something occurs to excite his suspicions." *Vail v. Vail*, 233 N.C. 109, 116-17, 63 S.E.2d 202, 208 (1951) (emphasis added; citation and internal quotation marks omitted).

This Court has also applied the "due diligence" standard in determining when the statute of limitations begins to run on a claim for breach of fiduciary duty. *Dawn v. Dawn*, 122 N.C. App. 493, 495, 470 S.E.2d 341, 343 (1996) ("The statute begins to run when the claimant 'knew or, by due diligence, should have known of the facts constituting the basis for the claim.' ") (internal quotation marks omitted) (citing *Pittman v. Barker*, 117 N.C. App. 580, 591, 452 S.E.2d 326, 332, *review denied*, 340 N.C. 261, 456 S.E.2d 833 (1995)). We also find it appropriate to apply this standard to Wilson's constructive fraud claim. *See Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 485, 593 S.E.2d 595, 601 (2004) (applying the "reasonable diligence" standard applicable to actions grounded in fraud to determine whether the pertinent statutes of limitations barred the plaintiffs' claims for fraud, constructive fraud, negligent misrepresentation, and unfair and deceptive trades practices).

Here, the relevant events concerning the timing of the alleged fraudulent acts were as follows: Wilson deposited $250,000.00 in the Ipswich Security Account in 1996; the check was issued on 23 October 1998, and it became void in April 1999; and the Ipswich Security Account was closed in July 1999. The gravamen of Wilson's amended complaint is that the relevant fraudulent act occurred when the Ipswich

Security Account funds were "secretly" transferred in July 1999. Wilson inadvertently came across the check in 2013 after he "discovered [and searched] Ipswich's detailed documentary records that had been kept in storage for [him]." In pleading his claims for breach of fiduciary duty and constructive fraud, Wilson alleges that:

> 95. Despite meeting with his trusted advisors on regular basis until through at least 2005, at no point was Wilson notified or did Wilson receive a statement indicating that funds in the Ipswich Security Account were transferred or the Ipswich Security Account was closed.
>
> . . .
>
> 98. Wilson placed his confidence and trust in the Defendants and the Defendants acted in a manner that did not cause Wilson to become suspicious. This relationship of trust and confidence delayed Wilson's discovery of the fraud, and until Wilson's recent discovery of the check and refusal to honor the check or provide funds in the Ipswich Security Accounts, the refusal to provide Wilson with information regarding the Trust Account, and the "No Action Letter," the acts of one or more of the Defendants were only recently discovered and could not have been discovered with reasonable diligence, until recently.

Paragraph 127 of Wilson's fraud claim contains the allegation that "one or more of the Defendants intentionally failed to disclose [the transfer of the Ipswich Security Account funds in July 1999] to Wilson intending to fraudulently conceal knowledge of the transfer to Wilson."

Critically, despite the conclusory allegation at the end of paragraph 98, Wilson fails to allege how the exercise of due diligence would not have led Wilson to discover that the funds had been transferred or withdrawn. Wilson had the capacity to investigate the Ipswich Security Account's status at any time, as the account was opened with *his* funds for *his* benefit, and the check was found in the "detailed documentary records" that had been kept for *him*. There is no allegation that Wilson was denied access to his own files. Wilson also had the opportunity to discover that the funds had been transferred simply by inquiring as to the account's status or balance. Significantly, Wilson alleges that his "trusted advisors" never notified him or furnished him with a statement indicating that the Ipswich Security Account had been closed. It is possible that Wilson's advisors were tasked with handling certain matters related to the Harbor Cove project, and that they made representations

that lulled Wilson into a sense of security. But those advisors have not been named in this action. Nothing in the amended complaint suggests that any of the defendants (or their predecessors in interest) took any action or made any representation that prevented Wilson from learning about the issuance of the check or the subsequent transfer of funds. Although Wilson alleges that his trusted advisors never furnished him with a statement concerning the transfer of funds, Wilson does not allege that any of the defendants failed to *issue* such a statement. Similarly, while paragraph 127 in the amended complaint contains the conclusory allegation that one or more defendants fraudulently concealed the transfer, Wilson does not allege that he was denied access in any manner to information concerning the Ipswich Security Account.

"Our courts have determined that a plaintiff cannot simply ignore facts which should be obvious to him or would be *readily discoverable upon reasonable inquiry*." *S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 161-62, 665 S.E.2d 147, 151 (2008) (emphasis added) (citing *Peacock v. Barnes*, 142 N.C. 215, 218, 55 S.E. 99, 100 (1906)). Moreover, even assuming that relationships of trust and confidence existed between Wilson and Synergy, and Wilson and JBS Liberty, Wilson's failure to use due diligence in discovering the allegedly fraudulent acts could be excused only if he were "actually deterred" from "suspecting or discovering the fraud." *Vail*, 233 N.C. at 116, 63 S.E.2d at 208. Based on the unique circumstances of this case, we conclude that had Wilson made a reasonably diligent inquiry, he could have discovered the acts of which he now complains, or the lack thereof. Our conclusion rests upon the notion that Wilson was ultimately responsible for his own affairs. If Wilson's advisors negligently or fraudulently deterred him from inquiring as to the status of the $250,000.00 principal (plus gains) contained in the Ipswich Security Account, those advisors should have been named in this action. Wilson has not alleged that any defendant denied him the opportunity to investigate,[5] and nothing in the amended complaint—apart from references to trusted advisors—suggests that Wilson lacked the capacity to discover the alleged fraud when it supposedly occurred in 1999. Accordingly, Wilson's failure to use due diligence in discovering the alleged fraud has been established as a matter of law.

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5. We note that while paragraph 129 of Wilson's fraud claim contains a very general allegation that one of more of defendants "*are* intentionally withholding information"—meaning, currently withholding information—from him, Wilson fails to allege that he was denied the opportunity to investigate the Ipswich Security Account's status before or at the time when the allegedly fraudulent transfer took place (July 1999), or at any point until he discovered the check in 2013. (Emphasis added).

Wilson's arguments are without merit, and the trial court properly concluded that all of Wilson's claims—including the claims against Synergy and JBS Liberty—were barred by the applicable statutes of limitations.

III. Conclusion

For the reasons stated above, we affirm the trial court's order dismissing all of Wilson's claims against defendants.

AFFIRMED.

Judges BRYANT and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 MAY 2017)

BLANTON SUPPLIES OF LITTLE RIVER, INC. v. WILLIAM BARBER, INC. CUSTOM HOME BUILDER No. 16-916	Brunswick (12CVS1454)	Vacated and Remanded
EDWARDS v. PCC AIRFOILS No. 16-951	N.C. Industrial Commission (377113)	Affirmed
IN RE A.G. No. 16-1200	Rowan (12JA55)	Affirmed
IN RE FORECLOSURE OF RANKIN No. 16-771	Mecklenburg (15SP1520)	Affirmed
IN RE J.D.C. No. 16-1256	Caldwell (15J96)	Affirmed
IN RE J.F. No. 16-1169	New Hanover (15JA202)	Affirmed in Part; Vacated in Part; and Remanded.
IN RE J.R.E. No. 16-1140	Ashe (15JA26) (15JA27) (15JA28) (15JA29)	Affirmed in Part and Reversed in Part
IN RE J.S. No. 16-1039	Robeson (13JA118-119) (15JA340)	Affirmed in Part, Vacated and Remanded in Part.
IN RE McLEAN No. 16-1173	Franklin (14SP75)	Affirmed
MILLS v. MAJETTE No. 16-1145	Forsyth (13CVS7369)	Affirmed in Part, Reversed in Part and Remanded
MOSES v. N.C. INDUS. COMM'N No. 16-1197	N.C. Industrial Commission (TA-24351)	Affirmed
POSEY v. WAYNE MEM'L HOSP., INC. No. 16-1218	Wayne (16CVS1202)	Affirmed

STATE FARM MUT. AUTO. INS. v. PHILLIPS No. 16-162	Onslow (14CVS2747)	Affirmed
STATE v. BOYD No. 16-1090	Pitt (14CRS56115)	No Error
STATE v. BROOKS No. 16-828	Durham (15CRS52820) (15CRS52822) (15CRS52824)	Affirmed
STATE v. CRAIN No. 16-844	Gaston (14CRS61004)	No Error
STATE v. ELLISON No. 16-879	Cumberland (12CRS50249) (12CRS54162)	No plain error
STATE v. GANN No. 15-1344-2	Buncombe (14CRS311) (14CRS84454) (14CRS84455)	Vacated in Part, Dismissed in Part, No Error in Part, and Remanded in Part for Resentencing.
STATE v. GREENE No. 16-891	Watauga (15CRS50072)	No Error
STATE v. HOLLOWAY No. 16-940	Wake (13CRS218273) (13CRS218275)	No Error
STATE v. HUGHES No. 16-779	Yancey (13CRS50288) (13CRS50348)	Affirmed
STATE v. WATERS No. 16-985	Henderson (15CRS52360)	No Error
STATE v. WILKINS No. 16-1146	Wake (13CRS228201)	No Error
STATE v. WILSON No. 16-1043	Iredell (14CRS55588-89) (16CRS1418)	No Error in Part, Vacated and Remanded in Part.
WYNN v. TYRRELL CTY. BD. OF EDUC. No. 16-1130	Tyrrell (15CVS47)	Affirmed
ZENG v. DURHAM No. 16-1276	Durham (16CVD2432)	Affirmed

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